LEGISLATIVE HEARING ON H.R. 5

HEARING

BEFORE THE

SUBCOMMITTEE ON LABOR-MANAGEMENT RELATIONS

OF THE

COMMITTEE ON EDUCATION AND LABOR
HOUSE OF REPRESENTATIVES

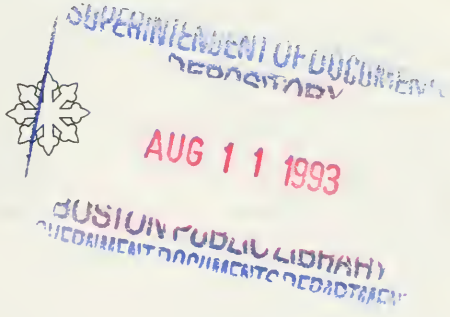
ONE HUNDRED THIRD CONGRESS

FIRST SESSION

HEARING HELD IN WASHINGTON, DC, MARCH 30, 1993

Serial No. 103–3

Printed for the use of the Committee on Education and Labor



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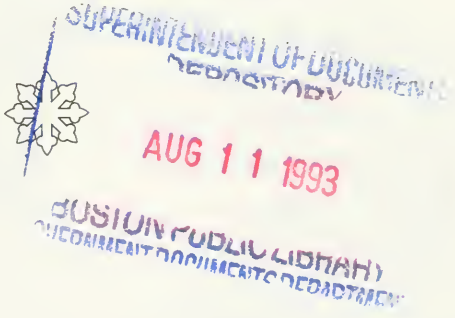

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LEGISLATIVE HEARING ON H.R. 5

TUESDAY, MARCH 30, 1993

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON LABOR-MANAGEMENT RELATIONS,
COMMITTEE ON EDUCATION AND LABOR,
Washington, DC.

The subcommittee met, pursuant to notice, at 10:15 a.m., Room 2175, Rayburn House Office Building, Hon. Pat Williams, Chairman, presiding.

Members present: Representatives Williams, Clay, Miller, Owens, Martinez, Payne, Klink, Becerra, Green, Woolsey, Romero-Barcelo, Ford, Roukema, Gunderson, Barrett, Fawell, Ballenger, Hoekstra, and Goodling.

Staff present: Fred Feinstein, chief counsel; John Weintraub, staff director; Gail Brown-Hubb, staff assistant; Paula Larson, staff assistant; Ed Gilroy, professional staff member; Kathy Gillespie, labor counsel; and Tim Butler, staff assistant.

Chairman WILLIAMS. Good morning. I call to order this hearing of the Labor-Management Relations Subcommittee. Today, we meet on old business. The legislation before us is H.R. 5 and is identical to the legislation passed last year by the House of Representatives. The Democratic House leadership is in support of this legislation, and I expect that the House will again pass this bill. Everyone understands the need for both labor and management to develop new cooperative relationships.

The Secretary of Labor, who will be our first witness today, has both written and spoken about the need to invest in the workforce, the need to build trust between labor and management, and to encourage participation by both sides. Restoring faith in collective bargaining is an essential part of reshaping a new workplace. Cooperation, trust, and a willingness to participate cannot be imposed from above; it comes from fair treatment, from fairness, balance, and reason.

Workers today, frankly, believe that the deck is stacked against them. Repeatedly in recent years, the have reported that when the workplace issues get difficult, their insistences are relegated to the back of the bus. If they don't like what's happening, they say, they can either withhold their labor, a cherished American right, or they can surrender; and if they choose the former, they will likely lose their job.

I commend the initiative of President Clinton and Secretary Reich in establishing the Commission on the Future of Worker-Management Relations. I'm encouraged at the prospect of working with the administration and the members of this subcommittee to

closely examine the current state of labor-management relations and what changes might encourage cooperative behavior, improve productivity, and reduce conflict and delay.

Before turning to our witnesses, beginning with the Secretary, I'll ask my members if there are any opening statements.

Mrs. Roukema.

[The prepared statement of Hon. Pat Williams follows:]

STATEMENT OF HON. PAT WILLIAMS, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MONTANA

Today, we meet to consider old business. The legislation before us, H.R. 5, is identical to the bill passed last year by the House. The House Democratic leadership is in support of this legislation. I expect the House will again pass this bill.

Everyone understands the need for both labor and management to develop new cooperative relationships. The Secretary of Labor has written and spoken about the need to invest in the workforce, to build trust and encourage participation. Restoring faith in collective bargaining is an essential part of reshaping the new workplace. Cooperation, trust, and a willingness to participate cannot be imposed from above. It comes from fair treatment. It comes from fairness, balance and reason.

Workers today believe the deck is stacked against them. Repeatedly in recent years they have reported that when the workplace issues get difficult, their views are relegated to the back of the bus. If they don't like what's happening they say they can either surrender or withhold their labor, an act which will probably result in their losing their jobs.

I commend the initiative of President Clinton and Secretary Reich in establishing the Commission on the Future of Worker-Management Relations. I am encouraged at the prospect of working with the administration and the members of this subcommittee to closely examine the current state of labor-management relations and what changes might encourage cooperative behavior, improve productivity and reduce conflict and delay.

Mrs. ROUKEMA. Thank you, Mr. Chairman.

It's certainly my pleasure to welcome Secretary Reich here today, as we open this session of our continued saga of the numbers of thorny labor issues that this subcommittee faces.

I am one whom, as you know, over the years numbers of us have worked cooperatively on a number of different issues. We have been able to work out our differences. However, I must say that with respect to H.R. 5, this particular piece of legislation, I believe that the 55-year-old Mackay doctrine should not be overturned; it has essentially served us well.

I am concerned that H.R. 5 would cause more harm than good by actually encouraging strikes. If so, we will return to the days of widespread labor unrest and hasten the demise of many businesses. Certainly, such a result is not in the best interest in the present economic climate, or at any time in the best interest, of labor or management.

In my opinion, current law amply protects workers' rights to strike and the right of employers to continue business operations during an economic strike; its purpose was to balance those competing interests and concerns. If, however, the strike is fully based on economic disagreements between labor and management, management may continue to operate during strikes with workers to whom it may offer permanent employment. After an economic strike concludes, strikers may get their jobs back as they open up; that is the essence of existing law.

I believe the remedies in the law are sufficient. However, I also acknowledge that malaise at the National Labor Relations Board

in processing cases involving the reinstatement rights of permanently replaced workers may be rendering the remedies of the law ineffective; that is, the delays at the Board level.

Instead of tampering with the law so as to disrupt the balance of interests at the collective bargaining table, I believe we should be concentrating on efforts in improving case processing at the Board so that the striking workers are more readily provided with their reinstatement and back pay, where legally required.

In the Mackay decision, the Supreme Court recognized the "business necessity" of hiring replacement workers, and that concept has a long history in our labor laws. I think that H.R. 5 attacks the wrong problem. Current remedies have worked amazingly well for the past 53 years. We need to look at expediting these remedies under the NLRA.

Finally, Mr. Secretary, I do want to again welcome you to the subcommittee and say that I hope that your testimony will touch, to some extent, on the Commission that you have recently announced and on the Commission's mission, which is to study the current state of Federal labor law. By the way, I should note that I believe three members of the Commission, including the chairman, are former Republican Secretaries of Labor; is that not correct?

[No response.]

Mrs. ROUKEMA. I think that gives a proper bipartisan tone to the commission—I hope so. At least, I'm thinking positively. I personally think that such a study, as the Commission has as its charge, might serve our committee well in a number of different areas, including that which we are addressing today. In fact, it would be my strong preference that we allow this Commission to complete its work before considering any legislation of this magnitude.

Indeed, Mr. Chairman, that has been my position, it was my position with the Bush administration, and it remains my position today.

Thank you. I look forward to the hearing.

[The prepared statement of Hon. Marge Roukema follows:]

STATEMENT OF HON. MARGE ROUKEMA, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NEW JERSEY

Mr. Chairman, we meet once again to consider legislation which presents this subcommittee with many thorny issues, not the least of which is whether it is time to overturn 53 years of settled labor law which allows employers to hire permanent replacement workers during economic strikes.

However, I must say that with regard to H.R. 5, I am not yet convinced that the 53-year-old *Mackay* doctrine should be overturned.

Indeed, I am concerned that H.R. 5 may cause more harm than good by actually encouraging unions to strike. If so, we will return to the days of widespread labor unrest and hasten the demise of many businesses. Certainly, such a result is neither in the best interests of labor nor management.

Current law amply protects workers' rights to strike, *and* the right of employers to continue business operations during an economic strike. If any employer is found to have committed unfair labor practices in the course of a strike undertaken to secure economic concessions from management, all economic strikers are entitled to full reinstatement and back pay. If, however, the strike is fully based on economic disagreements between labor and management, management may continue to operate during a strike with workers to whom it may offer permanent employment. After an economic strike concludes, strikers may get their old jobs back as they open up.

I believe these remedies are sufficient. However, I also believe that delays at the National Labor Relations Board in processing cases involving the reinstatement

rights of permanently replaced workers who may be rendering these remedies ineffective. And, while I believe that Congress should deal with delays in adjudicating the rights of labor and management at the NLRB, H.R. 5 does nothing to address these legitimate concerns.

Instead of tampering with the law so as to disrupt the balance of interests at the collective bargaining table under H.R. 5, I believe we should be concentrating our efforts on improving case-processing at the Board so that striking workers are more readily provided their reinstatement and back pay where legally required.

H.R. 5, by preventing management from hiring permanent replacement workers, would simply give organized labor little to lose in calling a strike, regardless of the merit of issues in controversy. In the meantime, business, which suffers from lost productivity and profits regardless of whether it hires temporary or permanent replacements during a strike, could be left without the ability to hire any permanent workers which could mean closing down altogether. At the same time he is attempting to invigorate our economy and create jobs, I must admit I am puzzled by President Clinton's support for this legislation, which could actually result in lost jobs.

In the *Mackay* decision, the Supreme Court recognized the "business necessity" of hiring permanent replacements, and that concept has a long history in our labor laws. I think that H.R. 5 attacks the wrong problem. Current remedies have worked amazingly well for 53 years. We need to look at expediting these remedies under the National Labor Relations Act.

Finally, I am pleased to again welcome Secretary Reich to our subcommittee and I look forward to hearing his testimony.

Mr. Secretary, I hope your testimony will touch, to some extent, on the Commission you have recently announced, and its mission to study the current state of Federal labor law. I personally think such a study might serve our committee well in a number of different areas, including that which we are addressing here today. If relations between labor and management are to have any future at all, they must be based on the common sense foundation of a National Labor Relations Act which cab be enforced fairly to protect the rights of both employers and employees. To that end, it would be my strong preference that we allow this Commission to complete its work before considering H.R. 5 or any other legislation that would so greatly effect labor-management relations. To do otherwise, would simply undermine efforts to improve those relations through consensus rather than conflict.

I look forward to hearing from all of our witnesses today. Thank you, Mr. Chairman.

Chairman WILLIAMS. Thank you.

Chairman Ford.

Mr. FORD. Thank you, Mr. Chairman.

I would like to, first, thank you for your prompt action in moving on this important legislation. I know that the gentlelady considers it—I think she said prickly but——

Mrs. ROUKEMA. Thorny.

Mr. FORD. Thorny? Well, for some of us, its like the flower at the top of a thorny branch.

I want to welcome the Secretary here. Mr. Secretary, it's a real pleasure to have a Secretary appearing before this committee who comes willing to work with us to find solutions to the problems before this committee.

Mr. Chairman, I would ask unanimous consent to revise and extend my prepared statement, which is 180 degrees in the other direction from the gentlelady from New Jersey.

Chairman WILLIAMS. Without objection.

Mr. FORD. I would also ask unanimous consent to insert at this point in the record the court syllabus of the Mackay Radio decision, which is going to be mangled throughout these discussions, as it just was, if we don't put it where people can read it.

Chairman WILLIAMS. Without objection.

Mr. FORD. You know, the fact of the matter is Mackay did not hire permanent replacements. There was some sloppy dictum in

the case that said—but if they had, it probably would have been all right. Now, this was on the books from 1938 until the early 1980s, with practically nobody utilizing it. No manager would do it. Why? Managers used to have a sense of responsibility towards their employees. They lived in the same town as the manufacturing plant, and they were concerned about, maybe, a trade name like the name Ford, in my area. While they had labor troubles and they had other kinds of troubles, their end motivation was not to destroy things but to keep things going.

When President Reagan became a hero on "Main Street USA" for having a shootout with PATCO over the Federal law prohibiting strikes, it got all mixed up in the minds of a lot of young executives who were in these corporations after voluntary and involuntary takeovers, highly leveraged operations that were struggling every day of their operation to squeeze pennies and stay alive. And all of a sudden, we saw a whole rash of ill-advised uses of this loophole, if you will, created by that court dictum breaking out across the country.

Last summer, we saw it come very close to warfare in the State of Illinois. There were, indeed, people living in my district that were prepared to go to Illinois and go to war when a company down there engaged in an economic strike started advertising around the State for people to take the jobs.

It comes down to a very simple proposition. The National Labor Relations Act was passed to give us a set of rules by which labor and management could collectively bargain to settle their differences, and it sets those rules out almost as precisely as the rules for playing a game of football.

Now, in football in the early days, and even in the time when I was going to school, there wasn't a penalty called "spearing," because helmets weren't good enough to keep you from breaking your neck if you speared in my generation. That's something that came along with modern football equipment that made it possible for a person to break somebody else's ribs, or worse, using their head as a weapon when it was encased in a fine, plastic football helmet. That was never in the books because nobody had ever done it, but circumstances changed and so the rules had to be changed to protect the people in that game.

Circumstances have changed since 1938. As the gentlelady has demonstrated, some people don't recognize that the labor-management relations of this country are a constant evolutionary process and that the change doesn't just get announced; it happens over a period of time. This is a change that we have had over a decade of experience with now. And it tells us, that unless we deal with this new tactic, new only in that it is a tactic that has been available but was never used, if we don't deal with it, we're going to go back to the bad old days before the National Labor Relations Act when labor-management relations were settled with violence on both sides.

The purpose of this legislation is not to encourage strikes; it is, as a matter of fact, a way to get strikes settled. You can't settle a strike once they have gone out. The last Secretary of Labor, through the Labor Department, became involved in the Illinois incident, and they pronounced that we had to do something. Because

what had been allowed to develop at Caterpillar could very well have led to a protracted labor dispute, with a tremendous loss to everybody involved, and no settlement in sight. Because the people with whom the company would be trying to settle no longer had any interest in the future of that company.

Mr. Chairman, this is important legislation. I hope that you are able to move it with dispatch.

I note that there is a press conference scheduled for immediately afterward through some misunderstanding, I'm told, by a special interest organization that feels that they should be the first people called upon to testify on the legislation. If they don't get a chance to be here, I will be glad to put their testimony in because I've heard it for, now, 28 years.

Thank you, Mr. Chairman.

[The prepared statement of Hon. William D. Ford follows:]

STATEMENT OF HON. WILLIAM D. FORD, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MICHIGAN

I'm pleased to welcome the Secretary to today's hearing.

H.R. 5, the striker replacement bill, seeks to restore balance to labor-management relations, a balance destroyed by President Reagan's firing of the PATCO workers. That action ushered in an era of strike-breaking unlike any this country has seen since enactment of the National Labor Relations Act of 1935.

Ever since the Supreme Court's Mackay Radio decision in 1938, employers have had the right to hire temporary or permanent replacement workers during strikes. But few business owners even considered the option, for several reasons.

They recognized their obligations to their communities, their employees and the long-term health of their companies. Employers and employees tended to be members of the same community. They shopped in many of the same stores and prayed together in the same churches. Their kids were in the Boy Scouts and Girl Scouts together.

Employers had seen that together with their employees, they had built the companies. They thought it was simply wrong to fire longtime employees over a temporary dispute. They knew hiring permanent replacements would cost them money—in training, bad morale and bad publicity.

In the 1980s, this sense of mutual obligation disappeared for many companies. Again, there were several reasons. One was that Congress had enacted several important changes in labor law over the decades since the NLRA, changes that diminished unions' ability to enlist secondary strikers as additional leverage. Detrimental Supreme Court decisions over the last decade restricted labor and emboldened management.

Perhaps as important, company restructurings that were rampant during the 1980s buy-out binge removed local ownership to some Wall Street banking house or distant conglomerate, where the new owners had never seen the plants of the businesses they were buying, only their balance sheets. The desire for profit—or just the need to maintain interest payments on their huge debt—eradicated any concern for the communities or for the businesses that had functioned well and served particular markets.

The kicker was Ronald Reagan's firing of the PATCO workers, which made him a kind of national hero. It set a terrible example for executives, who have followed precedent of beating on workers rather than resolving disagreements, and of focusing on short-term profits rather than long-term health.

The damage done to the labor-management balance is not always obvious. Many workers were replaced in bitter disputes, but their numbers are a misleading indication of what is really going on. A couple of high-profile cases demonstrated that management had a gun at labor's head, that labor negotiators had no choice but to agree to unfair offers. In most cases, workers were not replaced, because they did not strike.

This is a complex set of circumstances with far-reaching consequences. But there is a simple way to correct the problem of poisoned management-labor relations and the focus on short-term fixes: to change labor law. We can protect the rights of employees to strike for fair wages and conditions.

H.R. 5 would bar employers from hiring permanent replacement workers during labor disputes or granting preferential status to those who worked or were willing to work during a dispute.

I look forward to its swift enactment with the administration's support.

Chairman WILLIAMS. Prior to calling on the ranking member of the full committee as well as the bill's sponsor, I do want to alert the members that the Secretary's schedule is such that he now has approximately 40 minutes that he can remain with us.

Mr. Goodling.

Mr. GOODLING. I will be very brief, Mr. Chairman.

I would like to set the record straight a little. The General Accounting Office survey, which is cited by all sides in this striker debate, reported that employers actually hired permanent replacements in 17 percent of all strikes in both 1985 and 1989, and that in both of those years approximately 4 percent of striking workers were permanently replaced, 4 percent. Hardly conclusive evidence when it comes to such a monumental change in labor law.

I'm involved in the Illinois situation too. I have a plant of that organization that has lost its shirt year, after year, after year. The last offer was, "We'll try to keep the plant there. We'll give you a 3-year freeze, and we'll promise you 6 years of employment." A pretty good offer, I would say, when a plant is losing its shirt and really has no reason to stay open.

Let me just say, Mr. Secretary, when this came before us last year, I approached the situation with an open mind, went to my labor-management group back in my district that I meet with periodically and asked them what they see as the problem. They said they see three problems on the labor side.

They see three problems: Number one, that employers have all their people lined up before the strike ever takes place, as far as replacements are concerned. Number two, they said it's a real problem that the NLRB is so slow in dealing with their unfair labor practice charges that they've presented. Number three, they thought it was a union-busting effort.

I constructed some legislation which I presented on the floor of the House, and I say it must have been awfully good because I got 29 votes. My side of the aisle didn't want any changes; the other side of the aisle felt, "We'll take everything or nothing." Of course, we ended up with nothing.

In there, I tried to deal with their three problems by delaying any possibility of hiring replacements until a certain period of time after the strike has already been proceeding. Secondly, to extend the amount of time from a year to a year-and-a-half that a striker who was replaced would continue to vote in union elections. Third, I couldn't really get at it the best way I wanted to, to speed up the NLRB's deliberations, but we did try to attack that problem too.

That, I thought, brought us to a 50/50 level playing field. I approached it with the idea that perhaps at that time it may have been 52/48, and we ought to get it to 50/50, but certainly we can't take it to 25/75 and expect to have anything other than strikes continuously, in my estimation.

My hope was that since you have charged an Executive Commission with undertaking a comprehensive review of worker-management relations, that we would put these items aside until they re-

ported to you, and until you had an opportunity to report to us as to the direction you think we should go.

As I said to you when you were first named, I hope that we can bring the labor-management-government relationship into the 21st century; if we don't, we might as well kiss our way of life goodbye, because we're certainly not going to be competitive if confrontation is going to continue to be the name of the game rather than cooperation.

Thank you, Mr. Chairman.

Chairman WILLIAMS. Thank you.

Mr. Clay.

Mr. CLAY. Thank you, Mr. Chairman.

I ask unanimous consent that my entire statement be put in the record at this point.

Chairman WILLIAMS. Without objection.

Mr. CLAY. Mr. Chairman, I, first of all, want to thank you for the dispatch with which you have called this hearing and your intent to get this bill before the full House for a resolution. I also want to thank the Secretary for coming back to be with us. I will be very brief—very, very brief.

I must say, Mr. Chairman, that I'm a little bit disappointed that my friend and learned colleague would argue that there is no problem existing in this area because only 4 percent of the people who went out on strike were replaced. He fails to mention that in 30 percent of the strikes the threat was issued that, "Unless you go back to work, you will be replaced," and it caused, that 26 or 27 percent of instances where they were not replaced it caused, the workers to go back without resolution of the problems that caused them to go out on strike in the first place.

Only 4 percent? Well, I think only 4 percent is too much. I think only 3 percent or only 2 percent or only 1 percent would be too much. I think if one person lost his job because a scab crossed that line and took it, I think it's too much. And I think it's a problem that we, in this Congress, ought to deal with.

Mr. Chairman, I yield back the balance of my time.

[The prepared statement of Hon. William Clay follows:]

STATEMENT OF HON. WILLIAM L. CLAY, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MISSOURI

I want to thank the Chairman of the subcommittee, Mr. Williams, both for his consistent support of this legislation and for scheduling this hearing so early in the 103d Congress. I also want to thank the Secretary of Labor, Mr. Reich, Tom Donahue, and the other witnesses for appearing today. With the exception of health reform, enactment of this legislation will do more for the rights of working Americans than any legislation this Congress is likely to consider.

H.R. 5 provides that employers may not permanently replace workers who lawfully engage in a strike. In my view, it makes no sense to say on the one hand that workers have a right to strike, as the National Labor Relations Act states, and then provide on the other hand that an employee can nevertheless be fired for exercising that right. More importantly, permitting employers to permanently replace striking workers effectively undermines the only legal means workers have of protecting their wages and working conditions, destroys the balance between labor and management, makes a mockery of the collective bargaining process, encourages employers to promote strikes in order to destroy unions, and greatly exacerbates both the duration and the seriousness of strikes where they do occur. For all these reasons, I believe that the Congress must act to prohibit the permanent replacement of striking workers.

While other governments, notably Quebec, have enacted laws that prohibit employers from taking any action to replace a striking worker, H.R. 5 does not do so. Under the provisions of H.R. 5, employers retain a wide variety of options they may use to prevail in a strike. H.R. 5 does not prohibit workers from crossing a picket line; nor does it prohibit employers from seeking to maintain operations during a strike. It simply provides that employers may not grant or promise to grant permanent or preferential status to replacement workers over striking employees.

Historically, this country has sought to promote labor standards by balancing the labor-management relationship and thereby enabling employers and workers to establish their own terms and conditions of employment. Today, that balance is seriously compromised. Inevitably, workers who are unable to address their grievances directly at the workplace will take those grievances to their elective representatives. In a democracy such as ours, those legislators will ultimately respond. It is my concern, however, that such direct government regulation of terms and conditions of employment will neither provide workers the protection they would otherwise receive from bargaining agreements, nor employers the flexibility that is increasingly necessary to meet competitive market forces.

The issues raised by this legislation, therefore, go beyond the fair treatment of American workers. H.R. 5 is primarily intended to restore balance to our labor laws and protect the right of American workers to exercise a voice in the determination of their wages and working conditions. However, I believe that its enactment is also crucial if we are to further our competitive position in a global economy and promote the democratic values which have distinguished our country from others.

Thank you. I yield back my time.

Chairman WILLIAMS. Thank you.

Are there further requests for opening statements on this side?

Mr. Fawell.

Mr. FAWELL. Yes, thank you.

This bill attempts to rebalance the historic rights of labor and management during an economic strike, rights which have existed since the 1930s and which have served well, I believe, the collective bargaining process between labor and management. It is my view, though, that the rebalancing of this area of the law under this bill is totally in favor of labor and to the detriment of the economic environment in America, and I have four reasons.

First, this bill strips from management the historic, and the last resort, alternative to hire permanent replacement workers in the event collective bargaining fails and an economic strike ensues. Undeniably, there will be more strikes if such a law were to be passed and signed by the President, and terms of settlement will be much more favorable to labor.

Second, the bill would also take away this right of an employer to hire permanent replacement workers in instances of recognitional picketing, where there has not been a secret vote to even determine if the employees wish to join the union which is doing the picketing.

Third, the bill allows returning strikers to bump those employees who have elected to stay with the employer during the dispute. Thus, it effectively violates another long-time right of the workers of America, that is, the right *not* to strike.

Fourth, the bill places Congress squarely on the side of favoring unionization by providing guaranteed reinstatement rights only to those who join the unions. Thus, for the first time under the NLRA, the workers of America are treated differently. Depending, of course, on whether the worker during a strike is a union member or not is a bill biased for labor unions.

If passed, this legislation will lay such a heavy emphasis on the side of labor that the foundation of our system of collective bar-

gaining will be seriously undermined. Moreover, the workers of America who are overwhelmingly nonunion, as well as the employers of America, and the competitive ability of the American economy, I believe, will be ill-served.

Thank you, Mr. Chairman.

[The prepared statement of Hon. Harris W. Fawell follows:]

STATEMENT OF HON. HARRIS W. FAWELL, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF ILLINOIS

Proponents of this bill attempt to rebalance the historic, respective rights of labor and management during an economic strike—rights which have existed since the 1930s and which have well-served the collective bargaining process between labor and management. However, in my opinion, that rebalancing is totally in the favor of labor and to the detriment of our economic environment in America.

First, this bill strips from management the historic and last alternative resort to hire permanent replacement workers in the event collective bargaining fails during an economic strike. Undeniably, there will be more strikes. And these will be more strikes on terms more favorable to labor.

Second, the bill would also take away this right of an employer to hire permanent replacement workers in instances of recognitional picketing where the employees have not had a secret vote to even determine if they wished to join the union which is doing the picketing.

Third, the bill allows returning strikers to bump those employees after a strike who have elected to stay with the employer during the dispute. In effect, this nullifies the right of an employee to elect not to strike.

Fourth, the bill places Congress squarely on the side of favoring unionization by providing guaranteed reinstatement rights only to those who join unions

Thus, for the first time under the NLRA the workers of America are treated differently, depending, of course, on whether the worker, during a strike, is a union member or not.

It is a bill biased for labor unions. If passed, this legislation will place such a heavy emphasis on the side of labor that the foundation of our system of collective bargaining will be seriously undermined. Moreover, the workers of America who are overwhelmingly non-union, as well as the employers of America, and the American economy will be ill-served.

Chairman WILLIAMS. Are there requests on my right?

Mr. MARTINEZ. Mr. Chairman.

Chairman WILLIAMS. Mr. Martinez.

Mr. MARTINEZ. Well, I wasn't going to say anything—and I will submit a written statement—but just very briefly. I don't believe there is a historic right of an employer to replace workers where they have gone out on strike because collective bargaining has failed. Collective bargaining has no validity without the right to strike; that is essential.

The Mackay decision did not say that they would have the right to replace—they did say that they would have the right to replace the strikers permanently, but they put caveats on it. And those caveats are very important, giving those strikers the right to get reemployed upon vacancy openings in various ways. I think it's wrong to say that it has been the historic right of employers to replace strikers; that's not absolutely true.

Like I say, without collective bargaining, there is no power that the union has to invoke; and without the right to strike, there is no validity to collective bargaining. That's what it's all about. And so I think what we're trying to do in this is to set that balance that has been put askew because of the current trend of things, as our Chairman, Mr. Ford, has outlined earlier.

Thank you, Mr. Chairman.

Chairman WILLIAMS. Mrs. Roukema.

Mrs. ROUKEMA. Mr. Chairman, I would request unanimous consent that all members have the opportunity to include their statements in the record, and in the interest of time, that we are now open to the Secretary's testimony.

Chairman WILLIAMS. If there is no objection, we will move on to the Secretary. I appreciate the efforts of the gentlelady to bring the Secretary before us.

Mr. Secretary, again, we give you a hearty welcome to this subcommittee. Together, we have been about important business very early on in this administration. It's always nice to see you, and particularly nice to see you before this subcommittee today.

Please proceed.

[The prepared statements of Representatives Payne, Klink, Woolsey, Barrett, and Ballenger follows:]

STATEMENT OF HON. DONALD M. PAYNE, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NEW JERSEY

Mr. Chairman, I want to commend you for holding this hearing on one of the most crucial issues that will affect the lives of almost all American employees as we enter the next century.

Since 1935, the National Labor Relations Act has protected the right of workers to join unions and engage in collective bargaining. One of the most important protections of the Act is the prohibition of firing workers for exercising their right to join or help organize a union.

Ironically, only during a strike is it legal to replace employees for supporting union activity.

Mr. Chairman, it is crucial that when workers go on strike to gain improved working conditions that they are not faced with the threat of being replaced.

Permanently replacing workers who strike was deemed lawful by the United States Supreme Court 53 years ago in the Mackay Radio Case.

Indeed in the past years some employers have not hesitated to effectively fire many striking workers and that is not fair.

The effective right of workers to withhold their labor as leverage during negotiations is an essential element of our bargaining system. As workers have felt increasingly unable to strike, faith in collective bargaining has been seriously undermined.

Yet, the Striker Fairness Replacement Act can help to restore that faith in the system. It will reverse the Mackay Radio case by prohibiting the hiring of permanent replacements during a labor dispute and prohibit discrimination against striking workers returning to their jobs once the labor dispute is over.

Therefore, this legislation is needed to restore confidence in the process which underlies all of our labor laws.

In conclusion, I am looking forward to working with the Clinton administration on getting this bill finally passed. Additionally, I would like to welcome the witnesses, especially our new Secretary of Labor, Robert Reich and I look forward to hearing all of the testimony.

STATEMENT OF HON. RON KLINK, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF PENNSYLVANIA

Thank you Mr. Chairman. I appreciate this prompt hearing on H.R. 5. I also appreciate the appearance of Secretary Reich. Thank you Mr. Secretary.

Mr. Chairman, like many on this subcommittee, I am concerned about the practice of hiring permanent replacements for striking workers.

Sometimes, withholding services is the only thing union members can do, and it is always done reluctantly. However, when management can replace workers permanently, that eliminates any option unions have for dealing with management effectively.

That is why I have cosponsored H.R. 5, which would prohibit the hiring of permanent replacements during a labor dispute and also prohibit discrimination against striking workers who return to their jobs once a labor dispute is over.

As a member of the American Federation of TV and Radio Artists [AFTRA], AFL-CIO, I have been across the table from management at many negotiating sessions. I realize the problems that union members face.

I also understand the concerns of employers. Management will still have the option of hiring temporary replacement workers under H.R. 5.

But hiring permanent replacement workers disrupts the collective bargaining process. That is why I support H.R. 5.

I look forward to the testimony of Secretary Reich and the other witnesses and to the quick approval of H.R. 5.

Statement of Lynn C. Woolsey, a Representative in Congress from the State of California

Mr. Chairman, I commend you for your efforts this year, and in years past, to respond aggressively to the threat to our Nation's workers posed by the practice of permanently replacing striking workers. I also welcome our distinguished panel and extend warm greetings to Secretary Reich, who has been before this committee previously this year.

Mr. Chairman, one of the first actions I took as a Member of Congress was to sign on as a cosponsor of this bill, H.R. 5. Countless times during my campaign, I was approached about this bill by men and women who were victims of striker replacement, and I was deeply touched by their stories. These hard workers and their families have suffered terribly for the simple fact that they exercised their legal right to strike—a basic right that all workers must retain in any democracy.

I find the actions of those employers who permanently replace strikers to be reprehensible. Labor negotiations are an essential tool for both sides in the bargaining process. As a former human resources manager, I know that employers who treat workers fairly, provide safe work environments, and living wages for their employees are rewarded with increased worker productivity—and make our Nation more competitive.

But presently, the negotiations process is being circumvented by many employers who refuse to come to the table and instead choose to, for all intents and purposes, fire striking workers by hiring their permanent replacements.

Mr. Chairman, this legislation affords the protection that these workers deserve. I am wholeheartedly in support of it, and look forward to working to ensure its expeditious passage.

Statement of Hon. Bill Barrett, a Representative in Congress from the State of Nebraska

Thank you Mr. Chairman.

I'm not going to belabor the fact that I'm opposed to H.R. 5 and that we all know that it's on a fast track out of this subcommittee. I believe this bill is a grave mistake and the proponents of the bill have failed to show that employers are permanently replacing workers in droves. A GAO study proves quite the opposite.

But Mr. Secretary, I want to focus my comments to you about the administration's Commission for the Future of Worker-Management Relations. Press reports state that one of the labor laws this commission will review will be the Railway Labor Act [RLA]. If this is true, I'm pleased the Commission is looking at the RLA, and I hope it will take a balanced look at the RLA and other labor statutes.

As a member who represents a sizable number of railroad workers and businesses that rely on the railroad system, I have a vested interest in the Commission's review of the RLA. I remember well the pretty tight squeeze I was in twice in the last Congress when we had to step into rail labor and management disputes. Regrettably, the RLA's antiquated dispute resolution process left Congress little choice on both occasions.

I would like to know how Members of Congress and other interested parties will have an opportunity to have input into the Commission's review? Will it be holding public hearings?

Last April, I wrote to Representative Al Swift, the Chairman of the Subcommittee on Transportation and Hazardous Materials, and who has jurisdiction over the RLA, and I asked that he hold a hearing on the RLA's problem dispute resolution process to see if there were other alternatives. While I'm disappointed that he didn't take up my suggestion, do you think reforming the RLA's problem dispute resolution process is an issue Congress should look at?

Mr. Secretary, I appreciate your taking the time to answer my questions on the Commission. It's not often that I get to talk with a Labor Secretary.

Thank you Mr. Chairman.

STATEMENT OF HON. CASS BALLENGER, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NORTH CAROLINA

Most Americans say that labor unions have enough power under current labor laws. But some in Congress prefer to listen more to Big Labor than to the American public.

A survey conducted in January, 1991 by the research firm of Penn & Schoen Inc. asked if companies should be permitted to operate during a strike using replacement workers. A 63 percent majority agreed that they should be able to do so. Also, 64 percent of Americans feel that Congress has already done enough to protect labor unions. Finally, 54 percent say that replacement workers should not be fired at the end of a strike. An April, 1992 poll released by Time/CNN showed even greater opposition to changing the law. By a 60 percent margin, Americans showed that they would not favor a Federal law that would prohibit employers from hiring permanent replacements for striking workers.

Current labor policy is designed to prevent every garden variety economic demand from triggering a strike, or from unions having unrestricted economic leverage during bargaining and strikes. Where union members voluntarily walk away from $38,000-a-year production jobs in Maine, or $98,000-a-year jobs as pilots, or $200,000-a-year jobs as professional football players, they know there is a substantial risk that other workers might find such pay to be acceptable. If the unions miscalculate, if their economic demands are unreasonable, they should not be accorded the same right to automatic reinstatement as if they were protesting an employer's unfair labor practices.

The strike bill [H.R. 5] would remove the distinction between an unfair labor practice dispute and an economic strike. Under H.R. 5, an employer's inability or unwillingness to accede to a union's economic bargaining demand, no matter how unreasonable, would be treated the same as if the employer had committed an unfair labor practice. Workers who strike for an economic reason, no matter how outrageous, would be assured of returning to work any time they chose to do so.

This legislation would tie the hands of management, and contract negotiations would be inherently one-sided. Unions will make their economic demands, and if business does not meet these demands, employees will not work. Business has one option—give them what they want, even if these demands are unrealistic in relation to the market and economic trends.

The introduction of H.R. 5 signals that union leaders want to skew the bargaining process. But existing labor laws afford union members a great deal of latitude in bargaining contracts and achieving their goals.

The mere threat of a strike presents employers with incentives to bargain a fair contract. Strikes disrupt business, thus slowing production and lowering profits. Long-term strikes can effectively shut down a company. Employers are faced with few choices. They may either shut down and lose all revenues, take on the daunting task and expense of recruiting and training replacement workers, or meet the demands of strikers. Clearly, employers have numerous economic incentives to negotiate a fair contract with union members.

In most cases, a striker will not lose his old job, even if striking for economic reasons. An independent study conducted by the Employment Policy Foundation found that cases involving the hiring of replacement workers have remained relatively constant since 1938 and during the 1980s, only 4 percent of striking workers were replaced.

Risk-free economic strikes, especially during a weak economy, is bad public policy. H.R. 5 is a strike-maker bill—not what our country or our economy needs.

STATEMENT OF HON. ROBERT B. REICH, SECRETARY OF U.S. DEPARTMENT OF LABOR, WASHINGTON, DC

Secretary REICH. Thank you, Mr. Chairman.

In the interest of brevity, with your permission and the subcommittee's permission, I would like to submit my formal testimony for the record and briefly summarize my points.

First, I want to state at the outset very clearly and unequivocally the President's support for this legislation. The President is supportive of this legislation which would bar the use of permanent replacement workers in a strike, and I want to talk about why.

It is not simply a matter, although it certainly is a matter of fairness and decency, it is not simply a matter of fairness and decency. It is also time to close the book, Mr. Chairman and members of this committee, on an era of distrust and hostility, an era of labor-management relations—particularly during the 1980s—which has been characterized by a failure of labor and management to reach agreements, to become partners, at a time when it's critically important for both sides to become partners.

Now, some people say this dates from the PATCO strike. Obviously, the parallels are not exact because that was an illegal strike. Some say it has its foundations in the wheeling and dealing of the 1980s, the "short-termism," a period of junk bonds. What former Budget Director Richard Darman called, "now-nowism." I never thought I would be quoting former Budget Director Richard Darman favorably, but I think he was on to something.

Managers began looking at the short-term, not at the long-term, not at long-term relationships, not at long-term trusts. Before the 1980s, it was very rare that there would even be a threat to replace striking workers with permanent replacements. In the 1980s, we've seen this threat again and again and again and we all know, we all know it has happened, the strikes have resulted in not just the hostility that has been created, we all know.

We've seen Eastern Airlines, Greyhound, Felps-Dodge, Pittston, New York Daily News, and Caterpillar. We all know. The 1980s are littered with these instances of fundamental breakdowns in labor-management relationships that end up "poisoning the well," even for enlightened managers. You see very few managers, very few managers—over the last 8 weeks that I've been Secretary, or 9 weeks, Secretary of Labor, it feels like more than 8 weeks or 9 weeks—I've been going around the country and I've been talking to an awful lot of managers about these issues, not just labor unions, not just employees. Again and again I get back from managers the same refrain, "We would never do this. This is bad. This is not long-term. Permanently replacing striking workers, this is bad for the bottom line."

The trouble is that a few continue to do it, and that "poisons the well" for everyone, because it undermines all our efforts to create a genuine partnership between labor and management. The only way we can increase productivity in this country—and you all know it, you all said it, and I've talked to you individually about—is to create a genuine partnership.

You cannot create a genuine partnership when one partner feels that there is a gun loaded, aimed at its temple. You can't create a genuine partnership when one partner feels that it is intimidated, that it can't fully participate as an equal in that partnership. That's what's going on here, that's what has gone on here, that's what continues to go on here.

Now, some people say that you're inviting more strikes. Well, employees don't want to strike; it's not something that employees relish. It is a last resort. It is a sign of complete breakdown. That's

the end of the line, when nothing else works. A lot of sacrifice is entailed for an employee in striking, sacrifice with regard to wages and benefits. Tremendous risk.

Employees don't want to strike. In fact, what we have begun to see during the 1980s is that sometimes shortsighted managers actually try to induce a strike. They advertise for permanent replacements. They try to induce a strike by making totally unreasonable demands so that they can get rid of their union. This undermines the very foundation of collective bargaining in this country. You can't build trust, you can't build loyalty and confidence and motivation by doing that. That's what this thing comes down to, not just decency, not just fairness.

Other industrialized nations, our major competitors, do not permit the permanent replacement of striking workers—Japan, Germany. The only one who does is one whose economy and economy performance and productivity we would not want to emulate over the last 10 years, and that is, Great Britain. Even South Africa is moving away from this position.

Now, mention was made of the Commission. The President asked me and Secretary of Commerce Ron Brown to organize a commission to look forward to the future of worker-employee relationships, not to the past. We want to close the book on the past; we want to close the book on this era of hostility. We can't to go forward until we do close the book.

Mention was made, the question was asked, "Why don't we wait until the Commission reports back?" The Commission is gathering new data. There are data here, there is analysis here. You all have gone over this issue again and again and again. The President has reviewed the deliberations, the analyses, the data on this issue. I have reviewed the analyses, the data, the research on this issue. This issue doesn't need to be re-researched. The President has concluded that this is not a step toward positive labor-management relations. That Commission, again, is going to look to the future. We want to close the book on an era of hostility and distrust.

Let me say, finally, Mr. Chairman and members of this committee, there are two ways of looking at labor-management relations in this country. You can either look at them, as mathematicians would call it in game theory, as a zero-sum game in which one side wins only to the extent that the other side loses. Maybe some people continue to want to view it that way. That's not going to win us international competitiveness, and that's not going to generate high-wage jobs in the future.

The other way of looking at the potential for labor-management relations is to look at them as, what mathematicians call, a positive-sum game, potentially win-win. Management and labor joining together to generate higher productivity, gain sharing, profit sharing, to produce a higher standard of living, and a higher return for shareholders.

The best managed companies in this country are moving rapidly in this direction. They are taking the long-term view; they are seeking positive-sum partnerships with their workers. You have a minority of companies using the intimidation of permanently replacing any worker that might—any workers that might go out on strike, and that intimidation itself undermines. It creates not just a

zero-sum game, but what mathematicians would call a negative-sum game. Everybody loses.

The list that I gave you has pockmarks. In the 1980s, nobody won. These are lose-lose propositions. That's what we are buying into if we are buying into the history of the 1980s. That's what this legislation is all about, closing the book on the 1980s, closing the book on a new management practice. It may have been legal, but management didn't use it abundantly until the 1980s.

Let's close the book; let's move on to the future. That's where I want to go, that's where the President wants to go, that's where the best managers in this country want to go. Thank you.

[The prepared statement of Hon. Robert B. Reich follows:]

STATEMENT OF HON. ROBERT B. REICH, SECRETARY OF LABOR

Chairman Williams, Representative Roukema, members of the subcommittee:

I am pleased to have the opportunity to appear before you today to help close the chapter on the last 12 years and to outline a new, more productive chapter in the history of worker-management relations.

The Clinton administration's plan for economic recovery and long-term growth calls for this Nation to invest in our future. And as our national economy becomes, increasingly, a global and technological economy, America's ability to be competitive will depend on how well we have invested in developing a skilled and motivated workforce. To succeed in this new economy, we cannot afford to waste any of our resources, especially the resource most firmly rooted within our borders: our people, their ideas, their education and their skills.

But to compete effectively on a world-class level, we need even more than a high-skill, high-wage workforce. We also need a new framework for labor relations—one that stimulates employee productivity and enables management to get the most out of its employees' skills, brainpower, and effort. Workers on the front line have unique perspectives on production and immediate access to information that smart businesses depend on for quick response and high quality. So it is not surprising that an increasing number of companies are finding that they profit when they treat their workforce not as just another cost to be cut—but as an invaluable asset to be developed.

The administration is committed to fostering practices that improve productivity. And I have seen many illustrations that both productivity and profitability increase when workers have a voice—whether through collective bargaining or other means of promoting cooperation between workers and management and fostering employee involvement and participation in workplace decisionmaking. We cannot afford to limit American competitiveness by any practices that inspire workers and managers to work at cross purposes. What will make us most competitive is a dedicated and innovative workforce—and this requires a partnership between workers and employers, predicated on teamwork and mutual respect.

In short, good labor-management relations make good business—and a healthy economy. But in the most recent chapter of American labor history, productive relations between some companies and their unions have been thwarted by increasing distrust, hostility, and litigation. The permanent replacement of strikers exemplifies practices and attitudes that make real cooperation between labor and management impossible, by undermining the basic foundations of the collective bargaining system. As an editorial in the *Journal of Commerce* pointed out, labor cannot approach negotiations with trust and a sense of shared purpose when management has a gun pointed at the union's head. Management that has the option of simply eliminating the other side has little commitment to finding a mutually satisfactory resolution of differences.

The practice of permanent striker replacement became a prominent feature of American labor relations only in the last dozen years. I believe many employers were emboldened when, in 1981, 11,400 PATCO strikers were fired and permanently barred from reinstatement. Although PATCO was considered an illegal strike involving public sector employees—which differentiates it from the work stoppages addressed by this legislation—the action taken in 1981 sent a loud signal to the business community that the hiring of permanent replacement workers was an acceptable way of doing business. This, coupled with a distorted focus on short-term performance at the expense of long-term interests, began a decade characterized by a

wave of labor disputes in which thousands of employees lost their jobs after they engaged in completely lawful economic strikes.

Strikes are usually an act of desperation, a last resort which employees undertake at great economic and often personal risk to themselves and their families. When workers enter negotiations, the last thing they want to do is strike. But the availability of that option is a crucial counterweight to the economic powers that business owners and managers bring to the bargaining table. This is why the right to strike is a fundamental premise of American labor law.

At its best, collective bargaining is a win-win process. But without a viable right to strike, employers have less incentive to engage in serious bargaining with their unions, to hammer out mutually satisfactory solutions. And unions see no point in trying to work cooperatively with management when there is no real avenue for dialogue.

In the changed climate of labor relations, more employers have been willing to choose intimidation over serious negotiation. Some companies even advertise for permanent replacement workers *before* they begin negotiations—stockpiling them just like raw materials. Successful bargaining is made even less likely if the workers do take on this added risk and strike—and are permanently replaced. The rehiring of the strikers, and the fate of their replacements, add highly-charged, problematic issues that replace and obscure the original dispute. A study conducted in 1989 by Professor Cynthia Gramm of the University of Alabama-Huntsville indicated that the use of permanent replacements not only complicates the dispute, but also prolongs the strike. Productivity is reduced by prolonged strikes—as well as by the permanent displacement of skilled and experienced workers.

Although permanent replacements have been used by only a minority of employers, the practice affects even those employers who would never use, or even threaten to use, this weapon. All employees receive the message that they are disposable, each time a workforce is permanently replaced or threatened with permanent replacement. This undermines, throughout the economy, the trust necessary for true cooperation between workers and managers.

Enactment of the Workplace Fairness Act will enable us, finally, to close the book on this counter-productive recent chapter in American labor law. The legislation would restore balance in collective bargaining, allowing management to operate during a strike through alternate means, but not destroying fundamental union rights. The administration supports this legislation, because it would foster the equilibrium and stability in industrial relations which are critical to the health of our economy. The sooner that we can conclude this chapter, the sooner we can turn our attention from the past and begin, together, to write the next chapter.

But we risk failing to meet the challenges that await us if—as Louis Brandeis said nearly 90 years ago—we "assume that the interests of employer and employee are necessarily hostile—that what is good for one is necessarily bad for the other. The opposite is more likely to be the case. While they have different interests, they are likely to prosper or suffer together." We need to remember that management doesn't "win" when labor "loses," just as workers don't triumph when businesses fail. Maintaining a balance of power that promotes labor-management cooperation promotes our long-term economic strength; undermining that balance puts us all at risk.

This recognition stands behind the profitability of firms that give employees a stake in the future of the business by making them real participants in decision-making. In the automobile industry, for example, the use of employee-involvement systems at Ford has dramatically improved assembly-line productivity and quality. In the steel industry, National Steel—a company that employs advanced labor-management participation—posted operating profits of $11 a ton last year, at the same time its major rivals were showing $19 a ton losses. There are numerous success stories—such as Motorola, Federal Express, Xerox—that illustrate the mutual gains to businesses, labor, and the economy as a whole that accrue from mutual cooperation, responsibility and respect.

Times have changed since the thirties, when the first chapter of modern labor law was written. The traditional model of standardized mass production, based on economies of scale and the use of front-line workers as fungible components of the production process, will no longer sustain a high-wage economy. Instead, American competitiveness will be driven by a very different business model—one not so easily pigeonholed as producing "goods," rather than providing "services." This model relies on a structure that furthers constant experimentation, development and the flexibility to respond quickly to new ideas and needs by providing incrementally better products. Because workers are integral to the central process of collective in-

novation, they need flexible skills and responsibilities that will enable them to contribute.

As we write the new chapter of labor-management relations, characterized by mutual interest, rather than polarized distrust, we too will need to be flexible and open to new partnerships and new responsibilities. In this spirit, the Commerce and Labor Departments have joined together to facilitate these vital new relationships between workers and managers, by sponsoring the Commission on the Future of Worker-Management Relations. As Secretary of Commerce Ron Brown and I announced last week, the 10-member panel will be chaired by the distinguished professor and former Secretary of Labor John T. Dunlop, and will include former Secretaries of Labor and Commerce as well as a balanced group of experts from business, labor and academia.

The Commission is charged with examining the current state and legal framework of worker-management relations—and with recommending changes necessary to enhance workplace productivity through increased worker-management cooperation and employee participation. The passage of this legislation will enable the Commission to begin work with a clean slate. Then, with their help—and yours—we can start to concentrate on the solutions of the future, and not on the problems of the past.

Thank you. This concludes my prepared remarks. I would be pleased to answer any questions.

Chairman WILLIAMS. Thank you, Mr. Secretary.

Mrs. Roukema.

Mrs. ROUKEMA. Oh, Mr. Chairman, you surprised me. I thought you would go on with your questions.

Secretary Reich, I'm a little disappointed at your concluding statement and your evaluation of the present circumstance and how you're going to apply your Commission to future law. I was prepared to ask you in a little more depth as to why you will not add this issue to the agenda for the Commission, because it seems to me that they are inexorably tied, in my opinion. I don't really agree with you that all we are doing here is "closing the book on an era of hostility and distrust," as you put it, but I think we're doing much more than that with this legislation.

It seems to me that we are entering into an economic relationship here that is going to be very difficult for businesses, necessarily, to address—I mean, to hold onto their competitive position. And it may actually—it will, in my opinion, actually accelerate the competitive pressures.

Now, I'm not going to evaluate for Mr. Fawell from Illinois what the Caterpillar case was all about. But there, we know, the argument could be made that if arbitration had not been entered into we could have seen Caterpillar collapse, and no jobs would have been won and retained in that circumstance.

I think we're talking more about the real questions as to whether or not we are going to be able to remain competitive and whether or not some businesses are either going to have to close their doors, when faced with these circumstances, or survive somehow. I would have hoped that your Commission would have been willing to take this subject up as part of the broader range of issues.

Do you want to respond to that?

Secretary REICH. Sure. The Commission, as we have designed it, is free to take up any issue pertaining to the questions that the President and the Secretary of Commerce and I have asked the Commission, including any changes, any potential changes, in labor-management relations laws—regulations that might improve

productivity, generate cooperation, reduce litigation. Indeed, the Commission can look at any of these things.

My point simply, Congresswoman, was that the President in reviewing the data and research analyses and deliberations to date on this particular issue has made up his mind. This issue, this particular issue, in the President's view and my view is a very divisive one. It has become evermore divisive in the 1980s, and has shown up itself not only in particular instances of labor-management hostility, but also in all kinds of surveys, in all kinds of reports that show the disintegration of trust during the 1980s.

This is related, in part, to labor's fear that they cannot enter into collective bargaining, that they cannot actually enter into a dialogue with management because management always has the option now of permanently replacing any striking worker, so that there is not even at the end of the line a possibility of having any leverage.

Mrs. ROUKEMA. Let me go on to one more question. We will be taking this up with other testimony later, after your testimony, sir, where the assertion is quite different from the point of view of management.

Under the bill, I don't know if you have had a chance to have legal counsel analyze a specific provision of the bill that relates to the provision with respect to a strike occurring before a union is formally recognized as the exclusive bargaining agent. Under the bill, it would seem to me that a strike could be called by a union that is later found not to have the support of the majority of the workers, and whether or not they would fall into the bill's protection is evidently open under the bill.

I didn't know if you consider this a flaw in the construction of the bill, or if you feel that this a legitimate position. It seems to me to be a huge loophole in the construction of the bill.

Secretary REICH. My understanding is, at this point, and perhaps you can correct me, Chairman Williams—Chairman Ford, perhaps you can also correct me—there might be a slight difference between the Senate and House versions at this point. On the question of coverage, my understanding, and the President does support, a bill which when there is more than 50 percent voting for a union, that at that point there is protection.

Mrs. ROUKEMA. Well, then I don't know whether there is a distinction between the House and Senate bill. We will look into that. But in other words, there is an open area here where we could usefully discuss the intentions of the bill as well as any possible loophole being closed with respect to union representation?

Mr. FAWELL. Would the gentlelady yield?

Chairman WILLIAMS. The gentlelady's time has expired.

Mrs. ROUKEMA. May I yield to my colleague from Illinois—ask unanimous consent for another minute?

Chairman WILLIAMS. Is there an objection?

Mr. MILLER. Mr. Chairman, there are members down at this end of the table that didn't get to respond at the time of opening statements and are waiting to ask questions, so I would object.

Chairman WILLIAMS. The objection is heard.

Chairman Ford.

Mr. FORD. I will yield my time to the other members, Mr. Chairman.

Chairman WILLIAMS. Mr. Clay.

Mr. CLAY. I yield my time also, Mr. Chairman.

Chairman WILLIAMS. Mr. Martinez.

Mr. MARTINEZ. Mr. Chairman.

Mr. Secretary, in response to what the Commission is going to do, the Commission is going to have an abundance of things to do, because there are a lot of labor practices out there that really need to be looked into. Some of those labor practices have arisen because of the depressed economy, and some of them have arisen because there are people looking to make a little larger profit off the sweat of the people that are working. For instance, some of the major retailing companies have recently gone to part-time employees rather than full-time employees so they don't have to pay benefits or pay any of the other things that are required by law for a full-time employee.

I think you are going to have plenty of things to do without looking at this issue that has been rehashed for over 10 years, that I know of; because I've been here over 10 years. It was in full debate when I got here, and it continues to be in full debate. I think it's time to move on this.

I know that the claims of the other side are generally sincere and that the "balance of power," if you would call it that, shifts. Right now, though, they must face the reality that the employer has all of the advantage when he can replace strikers just as he sees fit because he doesn't want to, to begin with, deal with them in good faith. After the bargaining bogs down, letting them go out and strike and then rehiring new people as replacements for them, permanent replacements for them is one management response to unionized employees. I don't think anybody wants to see that; that's not fair.

On the other hand, we understand that the employers have got to have some rights. Somewhere we are going to have to come to grips with what we do in the case where the employer is left at a complete disadvantage because his business will go broke, as some of the others have said, because he can't operate, because he can't hire replacement workers. Nobody stops him from hiring temporary workers. But in the process, I would think, that the NLRB would play a bigger role than it does now.

I, unlike my colleague from the other side, do not believe that the NLRB has been as objective as it could be, has been as impartial as it should be, has been as impartial as it was required to be by law. In many cases when unions have brought grievances to the Board and the Board has refused to act on them, those unions have gone to civil court and won their case, which indicates that the National Labor Relations Board should have acted and didn't act.

My question is, then, would there be a potential for reconstituting the NLRB, appointing different people than just those appointed by the President, people who might represent a broader spectrum of that constituency that's out there—management, labor, et cetera? They would sit much like a PUC does to arbitrate whether a strike is valid or not on economic grounds as a part of determining the well-being of the company?

Here, you take the well-being of the company into consideration as well as the well-being of the workers. Nobody is going to get wage and benefit increases or a cost of living increase every time it is requested. The unions have to go out and strike for these things. That being the case, they have to have some ability to do that in a reasonable way.

I'm just wondering, is there any thought at all to maybe changing the way we appoint members, or the makeup of the NLRB, so it really is an objective body and would look at these situations in an objective way? Is this something the Commission could study?

Secretary REICH. Mr. Congressman, I have no particular thoughts on the matter at this point. I would be happy to talk with you further about it. But with regard to the issue at hand, whether we are dealing with the labor piece—we're dealing with National Labor Relations Board, we're dealing with this particular piece of proposed legislation—it seems to me the underlying question, the underlying question we still have to ask ourselves is this: Are our companies in America merely collections of financial assets to be maximized, or are they collections of people whose talents and skills and commitments and motivations ought to be developed? I don't see how we can be productive if our answer is anything but the latter.

You mentioned balance of power. Well, I respectfully disagree with you that this is all about balance of power. I don't think that this is about balance of power. I think this is about how to improve productivity, increase the capacity of workers and managers to work productively together.

There is no way in this society we are going to be a highly productive Nation, unless there is trust and confidence and motivation and loyalty at the workplace, and we can't get that if we have a small minority of employers who are utilizing weapons like this which undermine the very principles of collective bargaining.

I am struck, and I want to say this and I'll stop with this remark, I want to emphasize that I am struck by how many employers, particularly of highly profitable firms, long-term sustainable profitable firms, tell me in confidence they would never even use the threat to permanently replace striking workers because they understand what that does to labor-management relations. We are dealing with a relatively small number of employers who are "poisoning the well" for other employers.

Mr. MARTINEZ. Thank you.

Chairman WILLIAMS. The gentleman's time has expired.

Mr. Goodling.

Mr. GOODLING. Mr. Chairman, I don't have any questions, just one or two comments as far as the Secretary is concerned. I think we are both trying to get to the same point. I don't think it is effective—and I read everything that you say, that the press prints. And I don't always agree that that's probably correct.

Secretary REICH. What the press prints is not necessarily the same thing as everything I say.

Mr. GOODLING. No one is more aware of that than I after the last 2 years.

But I don't believe it is an advantage to always preface your remarks concerning hostility and distrust by limiting it to the last 10

years. I am not sure that that brings about the kind of togetherness that is necessary. Being older than you are, that gives me some advantages and disadvantages. It gives me a historical advantage; it gives me disadvantages as far as infirmities are concerned and so on.

I lived through the steel strikes, the auto strikes, the airline strikes, et cetera, et cetera, and know what hostility is all about, know what distrust is all about, and also notice that management would nine times out of 10 eventually give in, because management could always pass it on to the consumer. All of a sudden, we discovered that that didn't work in the auto industry, didn't work in the steel industry, didn't work in the airline industry, et cetera, et cetera.

My only concern is that maybe we just talk about labor-management relationships in the past, the whole way in the past. Put it behind us and see what we can do to make sure that labor-management and government are a hand-in-glove, which is how Japan did so well. Although I would caution you to say that this might be the time to emulate Germany and Japan, I believe they are having more problems than they can possibly deal with, and there are many people who don't believe Japan can recover, as a matter of fact.

Again, I think we are trying to get to the same place. Because if we don't get there, as I told you a long time ago, if we can't bring this committee and the American people into the 21st century on labor-management-government relations, then we can't be competitive and we will fall by the wayside.

I appreciate your testimony. I would just eliminate the 10-year span. I think that there is a lot of past history that goes beyond that.

Secretary REICH. Well, Congressman, I appreciate that admonition. Let me say the reason I emphasize post–1981 is that, regardless of labor history, it seems to me that before then we were moving in a direction, generally speaking, toward collaboration.

You mentioned that businesses could at one time pass on their costs to their consumers. In the 1970s, a lot of American businesses realized that they couldn't, that they were involved in a global economy. A lot of the best businesses in America, unionized or nonunionized, unionized businesses—Xerox, National Steel, look at GM's Saturn for a recent example—they went in the opposite direction to the direction we are talking about today, the opposite direction to the direction of intimidation. They really built partnerships and they are still building partnerships for high productivity, for quality.

That is why I emphasized the last 10 years. Because it is so disappointing, that given the trends that we were on, given the necessity for moving in that trend, that we have had a few firms that have backslid so markedly and visibly, we are exactly seeking the same thing.

Mr. GOODLING. I think, however, you must say that during those last 10 years there are also an awful lot of firms that are still moving in the direction they were moving in, in the 1970s because they realized, and still realize, that that's the only way to survive.

Secretary REICH. I agree, absolutely.

Mr. GOODLING. That's the only way to get better productivity and that's the only way to get better quality. I'm amazed when I go into a Harley-Davidson in my district and realize that those workers determine whether this motorcycle is passed or isn't passed. Nobody else makes that decision. The workers make that decision. It is expensive to the company, but they are getting the finest bikes that possibly could come off those lines, and that's what I want to see.

Secretary REICH. Precisely. The way you get workers to be that involved, the way you get workers to participate, to take responsibility, to feel highly motivated, to feel that they have a stake in the company is not by intimidating them into cooperation. It is by bringing them genuinely into partnership. That is fundamental.

Mr. GOODLING. Also, probably not with a lot of government intervention.

Chairman WILLIAMS. The gentleman's time has expired.

Mr. Miller.

Mr. MILLER. Thank you, Mr. Chairman.

I just want to commend the Secretary for his testimony. I yield my time to Mr. Klink.

Chairman WILLIAMS. Mr. Klink.

Mr. KLINK. Thank you very much, Mr. Miller, for yielding.

Mr. Chairman, I have a little different perspective on this. I was a union negotiator before I got to Congress. In my job in television news, I represented my union, ATRA, in negotiations with the company. I can tell you from that perspective it is very frightening when management brings in "hired guns," somebody you don't know, someone who is not from your community, and they sit across the table from you and tell you if you don't accept what they are about to offer you that, indeed, they are going to replace everyone. I saw that happen.

In 23-plus years of doing news coverage, I covered a lot of strikes, from the late 1960s through the 1970s and the 1980s. I will tell you I was reflecting, as the distinguished gentleman was making his comments just a few moments ago, about the strikes that I covered, going back to the Fraternal Association of Steelhaulers strikes, which were sometimes very violent and had a dramatic influence on what happened in the steel industry back in the 1970s. Never was there a threat that those drivers were going to be permanently replaced. I never remember that happening. Yet, when the Greyhound drivers went out in the 1980s, they were replaced. Now, you have one group of drivers hauling steel and another group of drivers that are hauling people.

What did we see happen when the Greyhound drivers were replaced but a rash of accidents because of drivers that were ill-prepared. We saw fatalities and we saw injuries, and still those drivers have not ever been brought back onto the job; they are still permanently replaced. That situation has been allowed to continue.

I was more concerned, though, however, with your comments about wanting to put the past behind us and move forward, and you did mention Saturn, which I think has been something that has been a great pattern, where you have unions and management working together to move to the future and to see that profits are shared.

How specifically do you see this bill playing into that, and what additional plans would you and this administration have to see labor and management formulate more relationships like that, where we are not going to war with each other but instead cooperating with each other?

Secretary REICH. Well, Congressman, I think there are many initiatives that government can take which will encourage a better climate in labor-management relations toward, what I've termed, the positive-sum outcomes: high productivity, high wages. One initiative has been mentioned, and that is, getting together a group of experts—former labor secretaries, bipartisans, Republicans, Democrats—and looking at the future and asking how government can improve the climate between labor and management.

A second initiative already underway is to highlight the success stories. I spent, a couple of weeks ago, some time up at AT&T. They have just entered into a new agreement with the Communication Workers of America and other unions which focuses on high productivity, high quality, high wages, high benefits. Again, a positive sum, win-win kind of agreement; that's where we need to go. I'm going to work with management. I've already started working in a very collaborative way with the National Association of Manufacturers and other groups, trying to promote these kinds of work organizations. Again, this is a nonpartisan effort. But government must set a bottom line.

The question was asked before, why do we need government here? Because government shapes markets, government establishes the framework within which transactions occur. A few bad apples here can infect the entire barrel, and that's what has been happening with regard to the threat to use permanent striker replacements.

Mr. KLINK. Do you, Mr. Secretary, call H.R. 5 a win-win piece of legislation?

Secretary REICH. I would call H.R. 5 not only a potential win-win—a potential win-win—but a means of closing the book on what was definitely a lose-lose, and moving forward.

Mr. KLINK. I yield back my time.

Chairman WILLIAMS. The gentleman's time has expired.

Mr. Gunderson.

Mr. GUNDERSON. Well, thank you, Mr. Chairman.

Mr. Secretary, I'm one of those people who has been following your career and is fascinated by much of what you write and what you say. I think on a bipartisan basis, I agree with the goals, if not always the tactics. I understand why you can't come here today and say, "This isn't a solution to the problem."

I think there is a problem, but I don't think this is the solution. I understand why this is a tactic and a strategy, frankly, "a horse you've got to ride." I buy all that publicly. I hope at some point, though, you will tell me in a private conversation that this is not really what you would like to be the "first horse out of the box" in terms of promoting the kind of competitiveness that you would like.

When this passes this House and gets bogged down in the Senate, I encourage you to sit down with a bunch of us who want to literally find some kind of a middle ground between you can't replace

anybody, or you can replace everybody. There has got to be a middle ground here. I don't think present law does that, I don't think H.R. 5 does that. I plead with you, don't close the book on an alternative to, I think, an imbalance that does exist.

I would like to go on, like everybody else, though, to your Commission. I think the concept of a Commission on Worker-Management Relations is a good idea, but I hope you don't stop there. I hope you will recognize, as well, that we are looking at a challenge in the area of a global and hi-tech economy and how does labor law fit into that. I mean, just look at the issues.

We've already done mandated leave; we did ERISA last week in committee; we're doing striker now; we're going to do OSHA; we're going to do minimum wage; we're going to do pension reform; we're going to do NLRB reform; we're going to deal with discrimination caps; and some of us hope we're going to deal with alternative dispute resolution; and obviously myself and others hope we're going to deal with labor-management employee participation committees.

I plead with you, for the intellectual thought that you have given this issue, don't let us deal with these piecemeal. The worst thing we can do in your tenure as Secretary of Labor is by accident rewrite labor law 13 to 20 different times. And so I plead with you go beyond this Commission into a bigger area, if you would.

You comment a couple of times in your statement on employee participation programs. Can you comment today on the Electromation case at all and what may be some possible remedies in that area?

Secretary REICH. When I was in my confirmation hearing, I was asked about the Electromation case. I said at that time that I would investigate, I would have our Solicitor's Office look carefully at that, that if, in fact, the conclusion was that Electromation had a chilling effect on the kind of positive labor-management relations that we are all seeking that I would come back to Congress and seek some changes.

I have not got a final briefing from the Solicitor. The Solicitor this morning gave me a very preliminary briefing, and I look forward to working with Congress on that issue. I will share with you the information I receive, and if, in fact—I want to reiterate my statement, if, in fact—Electromation is having a chilling effect, a negative effect, on the kind of collaborative worker-management relations we all want to see, then I will have some ideas. And I look forward to working with you, all of you, with regard to what your ideas might be to cure that problem.

Mr. GUNDERSON. I appreciate that very, very much.

Secretary REICH. Let me also say, I don't view this particular piece of legislation as "the" solution, not "the" solution. Rather, I view it as a prerequisite to a whole series of solutions. That's why I keep on using the metaphor of "closing the book on an era of distrust." It is a highly divisive issue, obviously. But again, I want to stress that good managers, long-term managers don't use this, don't permanently replace striking workers.

I also agree with you that we should not attack these issues piecemeal; we need a framework. What I will try to do, and continue to do, is to provide this committee and Congress with a framework of viewing a whole set of issues affecting the workplace and

the workforce, because we need a new workplace, just as we need a new workforce. I have responsibilities now, and with other proposed legislation that the President has sent to Congress even more responsibilities, with regard to readying American workers for the work of the 21st century.

Simply working on the supply side of that problem, if you pardon the expression, is not adequate. You also have to work on the demand side, what happens in the workplace itself. That's why these issues are so critical. We have to create a new workforce, and we also have to create a new workplace which utilizes that new workforce effectively.

Chairman WILLIAMS. Mr. Secretary, you have been generous with your time. We know from visiting with you previously that you have overstayed what you told us you would be able to do.

Let me, in closing, just take one minute of the Chair's 5 minutes to say, like probably all of my colleagues, I've worked in a number of businesses. When I was younger, I worked in businesses that were not organized; I worked in business and industry that were organized. I've found in my life that working, being an employee, in a place that was organized was a great deal more "user friendly," to use the modern term.

I owned businesses, prior to coming to Congress, that were organized, and the difference between the cooperation, trust, and peace in my organized businesses compared with my friends in the area who had unorganized businesses and unorganized employees was a startling difference. Finally, Mr. Secretary, I've been fired and I've been permanently replaced, and I can tell you they taste about the same.

Mr. Secretary, you are very kind to come by with us. As I say, you have been generous with your time. I apologize to my colleagues for not being able to get to them all for their questions to you, but I know you are overextended on your time, and I promised you I would have you out of here some minutes ago.

Thank you for being with us.

Secretary REICH. Well, thank you all for having me.

Chairman WILLIAMS. Our next witness is the secretary/treasurer of the AFL-CIO, Mr. Tom Donahue.

Mr. Donahue, it's always a pleasure to have you before this subcommittee as well as the full committee. Thank you for accepting our invitation to be with us today. We look forward to hearing your testimony.

Please proceed.

STATEMENTS OF THOMAS R. DONAHUE, SECRETARY/TREASURER, AFL-CIO, WASHINGTON, DC; ACCOMPANIED BY BOB McGLOTTEN, DIRECTOR, AFL-CIO LEGISLATIVE DEPARTMENT, WASHINGTON, DC; AND LARRY GOLD, GENERAL COUNSEL, AFL-CIO, WASHINGTON, DC

Mr. DONAHUE. Thank you very much, Mr. Chairman.

I am Tom Donahue, secretary/treasurer of the AFL-CIO, and I am accompanied by, on my left, Bob McGlotten, the director of the AFL-CIO Legislative Department; and on my right, Larry Gold, general counsel of the AFL-CIO.

Mr. Chairman, we thank you for the invitation to testify about the Workplace Fairness Act of 1993. It is something over 2 years since we testified last about the Workplace Fairness Act of 1991. We have submitted a statement which discusses in some detail our position on permanent replacements. I would just like to touch upon some of the points that it makes.

This issue is obviously not a new one. We have been through it before this committee, the subcommittee; the committee and the House has been through it before. We revisit it only because the Senate fell just short of invoking cloture last year, while it was clear that a majority was present in that body to support the legislation. Now in a different political climate, with a new administration that has expressed its strong support for the Act, we hope and expect that the early wisdom of this committee and of this body will carry the day.

The purpose of this legislation is clear enough. We would prohibit the permanent replacement of strikers, overturn the judicially-created doctrine that has countenanced this destructive employer practice. It has come in recent years to threaten the very essence of free and productive collective bargaining.

The permanent replacement doctrine empowers employers to reject the very system of collective bargaining that the law claims to encourage; it renders the peaceful and equitable resolution of labor disputes far more difficult; it imposes costs not only on workers, but on society as a whole; and it validates the view of the least enlightened employers that workers can be treated as disposable resources to be exploited for short-term profit and then discarded if they fail to respect unilateral employer control of their work lives.

Where the permanent replacement strategy has been used, it has inflicted great hardship on workers, their families, and on their communities. The list of strikes is well before you and well known to you.

The people who oppose the legislation argue that it would somehow undermine our economic competitiveness, overturn 50 years of balanced labor relations, and give workers a license to strike irresponsibly and with impunity. Not a single one of those three points would withstand scrutiny.

As to competitiveness, as Secretary Reich testified, nine of the 10 major industrialized countries of the world prohibit by law a custom of permanent replacement of strikers. Among them is included Japan and Germany, two nations that don't seem to be having any trouble competing in the world marketplace. The same companies which offer complaint to this bill in the United States operate under laws in Canada which prohibit the permanent replacement of strikers, and they obviously are competitive there or they would leave.

The competitiveness argument, indeed, is an interesting one, because we all become more aware that our competitiveness depends upon a highly skilled and productive workforce, more stable and more cooperative labor relations. There is something anomalous about a legal doctrine that treats workers and bargaining agreements as disposable whenever the employer decides it serves his short-term interests.

As to overturning some supposed 50-year balance, the truth is that when the permanent replacement option was first devised by the Supreme Court in the Mackay decision in 1938, it had little effect. Because in 1938, and for at least 14 years thereafter—13 years thereafter, workers had rights that allowed them to respond effectively to that employer weapon. But in the years following 1938, in the revisions of the Act and in the case decisions, clearly the balance has shifted between management and labor toward management, and those changes have made the use of permanent replacements a far more potent weapon.

Finally, as to the need to protect employers from irresponsible strike, one, I don't think this bill would leave employers powerless. They can obviously still continue to operate in the face of a strike using: supervisors, temporary replacements, contracting out, stockpiling, and a variety of other tactics that employers have used with great success through the years in resisting strikes. Even today, the truth is, most employers—most employers will not use a permanent replacement strategy and rely on those other devices.

Furthermore, to suggest that workers lightly make a decision to strike is really to distort the whole discussion. Workers do not willy-nilly decide, or blithely decide, that they will go out on strike. They live from paycheck to paycheck, and they know the consequences of a strike. They know that they will lose income from day one of a strike. They take that decision very, very seriously. And to suggest that a change in the law is going to encourage them to strike, I think, is pure fantasy.

The debate over the bill ultimately comes down to two different visions of what the workplace is and what society is. In the one vision, there is a vision of a workplace where managers have total control, workers have few rights, no voice, and even less security. In that vision, the workers are not participants, they are disposable commodities.

The other vision, the vision that Secretary Reich testified to, is a vision of a workplace where there is cooperation and respect between management and workers, where workers are valued, and where management understands the importance of investing in the well-being and the productivity of those workers.

There are sometimes conflicts between the two sides in those workplaces, but there are ways to resolve conflict. And in the end, both labor and management know that they have a relationship that's sustaining. That's the vision that was the foundation of the National Labor Relations Act, it has served this country well when it has been heeded, and it is the basis of the Workplace Fairness Act.

For all those reasons, Mr. Chairman, respect for worker rights, for the equality of bargaining power, encouraging compromise, pursuing the better vision of the American workplace, we urge the Congress to enact the Workplace Fairness Act of 1993.

I thank you, Mr. Chairman, for the time, and I would be happy to try to address any questions or subjects.

[The prepared statement of Thomas R. Donahue follows:]

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TESTIMONY OF THOMAS R. DONAHUE, SECRETARY-TREASURER, AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS BEFORE THE SUBCOMMITTEE ON LABOR-MANAGEMENT RELATIONS OF THE HOUSE COMMITTEE ON EDUCATION AND LABOR ON H.R. 5, AMENDING THE NATIONAL LABOR RELATIONS ACT TO PREVENT DISCRIMINATION BASED ON PARTICIPATION IN LABOR DISPUTES

March 30, 1993

Mr. Chairman, my purpose in appearing before this subcommittee today is to state the AFL-CIO's appreciation to you and to the cosponsors of H.R. 5 for introducing this important measure and to urge prompt, favorable action on the bill.

H.R. 5 would overturn the judicially created "permanent strike replacement" doctrine first stated in Labor Board v. Mackay Co., 304 U.S. 333 (1938), and more recently amplified in such decisions as Belknap v. Hale, 463 U.S. 491 (1983) and TWA, Inc. v. Flight Attendants, 489 U.S. 426 (1989). Under that doctrine, even though it is unlawful for an employer to discharge his employees for engaging in a lawful economic strike, it is lawful for the employer to "permanently replace" such employees.

Very simply stated, the Mackay doctrine is contrary to the federal labor law's most basic principles and purposes. It sanctions a harsh injustice against working people who exercise their legal right to strike, and it provides employers with a far more destructive economic weapon than any that employees have -- or would desire to have -- in their arsenal.

The Mackay doctrine is equally contrary to the national interest in long-term labor and management relationships, and in

investment in our human resources. Permanent replacement is not a means of building a quality workforce, of investing in workers' skills, or of developing relationships built on mutual respect. It betrays a management approach whose premise is that workers are a disposable resource, to be exploited for short-term profit, and then, if the worker questions the employer's unilateral authority, discarded.

In these ways, the Mackay doctrine poisons our society's efforts to develop healthy and stable collective bargaining relationships, to reduce industrial unrest and bitterness, and to promote more humane and less exploitive workplaces.

I chose the word "poisons" in the preceding sentence with some care. I am told that the multitude of toxins which threaten our health typically do their deadly work after varying latency periods. So it is with erroneous and unwise judicial decisions. Depending on the interaction of a host of variables, the full effects of a flawed decision may not be felt for years or decades. Whatever was true in the past, at this juncture the evidence makes it clear that the use of the Mackay doctrine now threatens the very vitals of free and productive collective bargaining.

1. The National Labor Relations Act was a response to the widespread industrial disruption and instability caused by employer refusals to recognize their employees' right to form unions and bargain collectively. As the 1935 Congress declared, the "denial by some employers of the right of employees to organize and the refusal by some employers to accept the procedure of collective

bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce ...." NLRA §1, 29 U.S.C. §151.

Congress passed the NLRA to provide a procedure to guarantee employees their own free choice on union representation, so that representation disputes would no longer need to be settled through bitter strikes and picketing. Congress hoped and expected that, where the employees chose a union representative, the employer would respect the legitimacy of their decision and negotiate in good faith toward a mutually agreeable labor contract settling wages and working conditions for the contract's duration.

Under this NLRA system -- so long as the business continues and unless the employees evidence a dissatisfaction with their representative -- the employer and union are expected to renegotiate their contracts periodically in response to their changing understanding and appreciation of their changing needs. Congress certainly assumed that strikes would periodically occur in the normal course of collective bargaining, as parties would seek to pressure each other to reach accommodations; but Congress also assumed that strikes over these mediate issues would be far less bitter and disruptive than those of the pre-NLRA era. Over time, Congress believed, this system would generate stable institutions of collective bargaining that would prove beneficial to workers and employers alike, as well as to the society at large.

The theory of the national labor policy, then, is twofold:

First, employees have a right to pursue their interests

collectively without being subject to employer reprisals for their concerted activities. Employees have this basic right both in the context of securing union representation and in the context of bargaining for better wages and working conditions.

Second, the issue of union representation is to be separated out from the substantive issues concerning how an enterprise is best run in the mutual interests of its owners and employees. The former -- which involves the replacement of unilateral employer control with the system of collective bargaining -- arguably involves no mutuality of employer and employee interests, and, accordingly, it is to be settled through a government-administered procedure for determining employee free choice. The latter -- as to which there is, beyond any doubt, a mutuality of employer-employee interests in a prosperous enterprise -- is to be settled not through any government ruling but through the system of "collective bargaining, with the right to strike at its core," Bus Employees v. Missouri, 373 U.S. 74, 82 (1963).

It is an unhappy truth that a large number of American employers have never accepted the right of employees to freely choose a union representative and establish a system of collective bargaining. These employers have fought bitterly to preserve unilateral employer control of the workplace. And, as anyone knows who engages in union organizing, participates in collective bargaining, or observes American industrial relations, employer hostility to employee free choice and to free collective bargaining is growing rapidly, not declining.

Against that background, what we have been seeing over the past several years is a quantum increase in the number of employers who view collective bargaining negotiations not as the good faith renegotiation of wages and working conditions, but as an opportunity to override their employees' free choice of a union representative by recruiting a new workforce of "permanent replacements," who are unlikely to desire union representation and who are far more likely to defer to unilateral employer control. This has been the clear pattern at International Paper, Eastern Air Lines, Greyhound, the New York Daily News, Diamond Walnut, and many other firms. And, as these examples illustrate, this development has caused incalculable and unnecessary suffering to workers, their families and their communities.

The Mackay doctrine is central to this employer perversion of collective bargaining. Mackay allows employers to convert a dispute over what the terms of a particular collective bargaining agreement will be into a dispute over whether the firm will continue to have any relationship at all with the union, with the collective bargaining system, and, indeed, with its long-time workforce.

2. Stripped of the legalistic niceties, the Mackay doctrine is a grant to employers of the "right" to punish employees for doing no more than unionizing and engaging in collective bargaining. Mackay takes back a large part of the federal labor law's broad promise to employees that they are protected against employer retaliation if the employees choose to exercise their

freedom to associate in unions. And it does so when that promise would have the most meaning: during a collective bargaining dispute. At that critical time, the Mackay doctrine sacrifices basic workers' rights in the interest of aggrandizing employer prerogatives.

a. Section 7 of the Act -- which its author, Senator Wagner, described as an "omnibus guaranty of freedom" for American workers, (Legislative History of the National Labor Relations Act of 1935, Vol. 1, page 1414 (1949)) -- states:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection .... [29 U.S.C. §157.]

Section 8 of the Act, in turn, provides explicit assurances that workers who engage in the concerted activities protected by §7 will not be subject to employer reprisal. In particular, §8(a)(1) provides that "[i]t shall be an unfair labor practice for an employer ... to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [section 7]." 29 U.S.C. §158(a)(1). And, §8(a)(3) more specificallv prohibits employers, "by discrimination in regard to hire or tenure of employment or any term or condition of employment, to encourage or discourage membership in any labor organization ...." 29 U.S.C. §§158(a)(3).

Moreover, Congress' intent that the right to engage in a lawful economic strike is to be protected is not left to the generalizations of §§7 and 8; those protections are reinforced in §§2(3) & 13 of the Act. Section 2(3) states that employees do not

lose their status as employees when their "work has ceased as a consequence of, or in connection with, any current labor dispute." 29 U.S.C. §152(3). And §13 declares that "[n]othing in [the NLRA] ... shall be construed so as either to interfere with or impede or diminish in any way the right to strike ..." 29 U.S.C. §163.

As the foregoing shows, it has been understood from the first that the right to strike is integral to the operation of the NLRA system and that an employee may not be discharged for engaging in a lawful strike. See, e.g., NLRB v. Fleetwood Trailer Co., 389 U.S. 375, 378 (1967). Indeed, the square holding of the Mackay case was that §8(a)(3) prohibits an employer from discharging or otherwise discriminating against strike leaders. See Labor Board v. Mackay Co., supra, 304 U.S. at 345, 346. The Mackay opinion then asserted, however, although the issue was not before the Court, that the "permanent replacement" of a striker is fundamentally different from the discharge of a striker, and that an employer's action in "permanently replacing strikers" would be entirely permissible.

b. The notion that the law should recognize a fundamental difference between an employer's decision to discharge a striker and an employer's decision to "permanently replace" a striker ignores practical reality: in both instances the employee suffers loss of his job because he dared to exercise his statutory right to strike.

Not surprisingly, the Mackay doctrine is widely regarded as one that exalts form over substance and reflects the Judiciary's

historic hostility to worker rights. Indeed, Mackay is, in all probability, the most criticized decision in our labor law.

Professor Paul Weiler of the Harvard Law School has put the point this way:

> [T]he NLRA's unmistakable intent is that an employer may not discharge an employee in reprisal for going on strike. But Mackay Radio and its progeny allow the permanent replacement of the striker. Although the law distinguishes the two actions based on the subjective intent of the employer, the employee may be excused for not perceiving a practical difference as far as his rights under section 7 are concerned. The bleak prospect of permanently losing his job is obviously likely to chill an employee's willingness to exercise his statutory right to engage in "concerted activities". [Weiler, Striking a New Balance: Freedom of Contract and the Prospects For Union Representation, 98 Harv. L. Rev. 351, 389-390 (1984)(emphasis in original).]

Professor George Schatzki of the University of Connecticut adds that, even if the situation is looked at from the employer's perspective, the distinction between discharge and "permanent replacement" is meaningless:

> The distinction between permanent replacement and discharge ... can hardly mean anything to the displaced employee; and to the employer it can mean little more, since he is most unlikely to terminate strikers unless he is relatively confident that he can either find new employees to do the work or rehire the strikers after having bullied them by a false "termination". If the employer were intent on ridding himself of the strikers, to be safe he would be apt to wait until he has found replacements, even if he were given the option of "discharging" the strikers. As a practical matter, in almost all cases the Mackay doctrine -- despite its articulated distinction -- is an invitation to the employer, if he is able, to rid himself of union adherents and the union. [Schatzki, Some Observations and Suggestions Concerning A Misnomer -- "Protected" Concerted Activities, 47 Texas L. Rev. 378, 383 (1969).]

Not even law students, the society's apprentice sophists, can see the distinction that Mackay places at the center of our labor

law. William B. Gould, Stanford Law School's Charles A. Beardsley Professor of Law, has related:

> Every year when I teach my students about the rules relating to the strike weapon in Labor Law I, I always explain the practical significance of engaging in protected activity. I point out to them that the practical significance is that the employee is immunized from employer self help instituted against [workers] in the form of discipline or discharge for engaging in the conduct in question. But then I tell them that despite the fact that workers cannot be discharged or disciplined for engaging in a strike, they can be permanently replaced. Either this produces nervous laughter or expression of puzzlement -- and well it should! [W.B. Gould, The Permanent Replacement of Strikers, A Speech for the United States Department of Labor Symposium On Vital Issues and New Directions in Labor Management Relations (March 17, 1988), at 8-9.]

But, the clearest proof that it is spurious to distinguish between discharge and "permanent replacement" is the propaganda use to which anti-union employers put the Mackay decision. Our experience is that anti-union employers in NLRB election campaigns virtually always commonly cite the Mackay doctrine to their employees, and they do so to convey a threat: that unionization will lead to employer-imposed job loss. In congressional testimony three years ago, Professor Julius Getman of the University of Texas reported that in his study of 35 NLRB election campaigns virtually all of the employers threatened to use permanent replacements during a strike. And Professor Getman found that the "obvious intent" of these employers (confirmed in interviews with company officials) was "to convey the message that if employees choose to unionize, they would thereby endanger their jobs." Hearing before the Subcommittee on Labor of the Senate Committee on Labor and Human Resources, Preventing Replacement of Economic Strikers, 101st

Cong., 2d Sess. (June 6, 1990) at 112-113.

c. Given the magnitude of the harm the Mackay doctrine causes to employee rights, it is very much to the point that Mackay is not firmly grounded in the NLRA's text. Rather, as Professor Weiler has noted, the Mackay rule "was laid down [by the Supreme Court] in an almost offhand fashion," as pure dictum, with no citation to any authority whatsoever. Weiler, supra, 98 Harv. L. Rev. at 388.

As I noted earlier, the Mackay case involved an employer who discriminatorily refused reinstatement to union leaders at the end of a strike. The National Labor Relations Board, in its Mackay decision, expressly recognized that the case did not present the more general issue of whether an employer could validly hire "permanent replacements;" accordingly, the Board refused to reach that issue. 1 NLRB 201, 216 (1936). The United States Court of Appeals for the Ninth Circuit in its turn -- and although the appeals court dealt with the case twice -- did not even discuss the issue. See 92 F.2d 761 (9th Cir. 1937); 87 F.2d 611 (9th Cir. 1937).

Nonetheless, the Supreme Court used the occasion of Mackay to assert, as dictum, that the "permanent replacement" of strikers is entirely lawful. 304 U.S. at 345-346, 347. And, the Court has reaffirmed Mackay in subsequent cases on stare decisis grounds, without ever going back to examine the validity of its original decision in terms of the relevant statutory text, statutory structure, or legislative history. See, e.g., TWA Inc. v. Flight

Attendants, supra, 489 U.S. at 433-434; Belknap v. Hale, supra, 463 U.S. at 504 n.8.

d. Given this, it is not surprising that the Mackay doctrine has always been at odds with the rest of the labor law regarding strikers' rights. The Court's insistence that the Act does not restrict the employer's power to "permanently replace" strikers is an anomaly, given that the NLRA clearly does, as a general matter, restrict such employer powers.

For example, the Court has held that employers are prohibited from offering replacement workers post-strike super-seniority or added vacation pay, because such offers would be too destructive of the right to strike. See, e.g., NLRB v. Erie Resistor, 373 U.S. 222 (1963); NLRB v. Great Dane Trailers, 388 U.S. 26 (1967). Yet the Court continues to hold that employers may offer replacement workers permanent occupation of the strikers' jobs, even though this is clearly the offer that is most destructive of the strikers' rights. As a recent labor law treatise has commented, "It is as though the law permits killing but not wounding." J. Getman & B. Pogrebin, Labor Relations: The Basic Processes, Law and Practice, 141 (1988).

3. The gross injustice of the Mackay rule is made even more obvious when one recognizes the limited nature of the economic strike and the wholly disproportionate nature of the power that Mackay grants to the employer.

a. In an economic strike, employees engage in a temporary work cessation in order to influence the post-strike conditions

under which the employees will resume work for the same employer. This is recognized in the NLRA's definition of "employee," which specifies that those engaged in a strike are not to be considered as having permanently abandoning their work, but continue their status as "employees of the employer." See NLRA §2(3), 29 U.S.C. §152(3).

Thus, an economic strike has limited objectives and -- given the employees' interest in resuming work for a firm with a healthy long-term future -- an economic strike seeks to cause no long-term harm to the employer. Employees know that if they cause their employer long-term harm, they cause themselves long-term harm.

Given this, Mackay's recognition of an employer's right to respond to a strike by "permanently replacing" the striking employees is inherently inequitable. On the one hand, employees on strike are pursuing a limited dispute over current terms and conditions of employment, without renouncing their continued relationship to the employer, and without seeking to do any economic injury to the employer that extends beyond the length of the strike.

In contrast, the employer exercising nis Mackay "right" is renouncing any continuing relationship with his regular employees, is stating unequivocally that he will not alter his resolve to sever the relationship after the strike, and thus is seeking to impose long term -- indeed permanent -- economic injury on the employees.

b. The Mackay doctrine is inequitable in an additional way.

Mackay grants to employers what is by any standard the most lethal of economic weapons to use against strikers. In contrast, the labor laws -- as amended since Mackay (in the 1947 Taft-Hartley amendments and the 1959 Landrum-Griffin amendments) and as more recently interpreted by the courts -- severely circumscribe the ability of strikers to protect themselves from an employer who uses this weapon.

Thus, for example, the NLRA's secondary boycott provisions prohibit unions from responding to the hiring of "permanent replacements" by seeking support from those employees who work for the suppliers or customers of the employer. 29 U.S.C. §§8(b)(4) & (e).

Similarly, the NLRA's restrictions on union security arrangements prevent workers from seeking to ensure that their bargaining unit is made up of employees who are likely to respect strike solidarity in the face of a permanent replacement threat. 29 U.S.C. §§158(a)(3) & (b)(2). Indeed, under a 1985 Supreme Court ruling, the NLRA is now construed to prohibit union members from enforcing internal union rules under which members have promised each other that they will maintain solidarity during a strike, even if the employer takes steps to replace them. See Pattern Makers League v. NLRB, 473 U.S. 95 (1985).

c. Despite these changes, there are those who defend Mackay as an integral part of an unchanging collective bargaining system that was "delicately balanced" for more than 50 years, and that cannot be changed without unfairly tilting the balance against

employers. That defense of Mackay is a fantasy from beginning to end. At the time of the 1938 Mackay decision, the "permanent replacement right" existed within a legal framework in which workers could effectively defend themselves by using powerful counter-weapons of their own. Most of these counter-weapons, as we just noted, have now been taken away by two major legislative revisions -- Taft-Hartley in 1947 and Landrum-Griffin in 1959 -- as well as by substantial reinterpretation of the 1935 Wagner Act. All of these legal changes have enhanced employer power and disabled union power. The current situation is thus far different from that which prevailed at the time Mackay was decided. Now the employer not only has the abstract legal "right" to permanently replace, he has the right to do so with impunity, protected by law from the traditional forms of union protective responses.

4. The evil of the Mackay doctrine goes beyond its fundamental injustice to employees, as great as that injustice is. Mackay also serves to corrupt the collective bargaining process itself, and thus injures the society at large.

a. By promising permanent jobs to replacement workers, an employer not only creates widespread fear in his workforce, he also seriously damages the prospects for eventual compromise and settlement of the underlying labor dispute. The employer has not simply acted to prevail in a particular contract negotiation, but to displace the unionized workforce, eliminate the employees' union, and to reestablish unilateral employer control of the workplace. The availability of this employer strategy

fundamentally alters our collective bargaining system's ability to bring about acceptable compromise solutions to disagreements on wages and working conditions.

Our system of collective bargaining is more or less apt to succeed depending on whether both parties have an interest in reaching a mutually agreeable understanding. If one party comes to the table with a desire not to agree but rather a desire to force a confrontation in the hope of destroying the other, the prospects for a peaceful, honorable, and mutually beneficial settlement are close to zero. The Mackay doctrine sets up just such a life or death confrontation in place of the limited confrontation that the law contemplates.

I know of no more perceptive statement of the NLRA's theory of collective bargaining than Justice Brennan's often-cited summary in Labor Board v. Insurance Agents, 361 U.S. 477, 488-89 (1960):

> It must be realized that collective bargaining, under a system where the Government does not attempt to control the results of negotiations, cannot be equated with an academic collective search for truth -- or even with what might be thought to be the ideal of one. The parties -- even granting the modification of views that may come from a realization of economic interdependence -- still proceed from contrary and to an extent antagonistic viewpoints and concepts of self-interest. The presence of economic weapons in reserve, and their actual exercise on occasion by the parties, is [therefore] part and parcel of the system that the Wagner and Taft-Hartley Acts have recognized. One writer recognizes this by describing economic force as "a prime motive power for agreements in free collective bargaining." Doubtless one factor influences the other; there may be less need to apply economic pressure if the areas of controversy have been defined through discussion; and at the same time, negotiation positions are apt to be weak or strong in accordance with degree of economic power the parties possess. [Quoting G. W. Taylor, Government Regulation of Industrial Relations, p.18.]

Thus, the Act rests on the premise that the right to strike is essential to free collective bargaining and to a free economy. While I am far from admiring all he said and did, Senator Taft could not have been more right when he stated that "a free economy ... means that we recognize freedom to strike when the question involved is the improvement of wages, hours, and working conditions." 93 Cong. Rec. 3835-3836 (1947).

It is as true today as it was in 1935 -- to use the words of NLRA §1 -- that "inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce ..." 29 U.S.C. §151. And, it is as true today as it was a half century ago that only when employers are denied the right to punish employees for exercising the right to strike, and are denied the ability to rid themselves of collective bargaining by the use of economic power, will that inequality of bargaining power be rectified.

A collective bargaining system based on a right to strike will only tend to produce peaceful and equitable results if <u>both parties</u> have enough to fear from the other to wish to avoid a test of strength and to compromise their differences through the exercise of reason and moderation. Where there is no balance of power, there will either be no peace or there will be no equity.

b. In today's circumstances, it is not only industrial peace and employer-employee equity that is at stake, this Nation's

ability to succeed in the global economy rests primarily on a commitment to developing a highly motivated, highly skilled workforce, and to creating stable employer-employee relationships based on mutual respect and a mutual commitment to their joint enterprise. Nothing less is sufficient to ensure employers and consumers high productivity and high quality, and to ensure workers high wages and working conditions.

The Mackay rule takes us in precisely the opposite direction: toward transient, unequal employer-employee relationships that can never capture the best that working people have to offer.

5. Just as it would be a mistake to deny the effect of H.R. 5 on the comparative position of employers and organized workers in collective bargaining it would be a mistake to overstate that effect. Whatever my preferences may be -- and despite the assertions of various employer groups -- H.R. 5 does not come close to creating an imbalance in favor of working people. The reason for this is simple: all of the evidence demonstrates that employers have always had effective options in response to a strike other than the hiring of permanent replacements.

In many negotiations, of course, employers choose to ride out a strike without attempting to operate. The employer does so because the striking employees -- who are not earning their normal wages -- are under comparable pressure to avoid a long strike and reach a fair settlement.

In other instances, the employer does choose to operate. As one seasoned observer has pointed out, such an employer has many

options other than the hiring of outside replacements:

> [The employer] may be able to carry on with less than his full labor force by using nonstriking members of the bargaining unit, returning strikers, and managerial, supervisory, or other nonunion personnel. He may likewise be able to continue without production workers if he prepares for the strike by stockpiling in advance, or he may engage in "shifting" -- transferring work from a struck to a non-struck factory for the duration of a strike. Finally, the employer may subcontract work normally done by the striking employees. [Gillespie, The Mackay Doctrine and the Myth of Business Necessity, 50 Texas L. Rev. 782, 790 (1972).]

Until recently, these options have been the ways in which most employers have responded to strikes. A 1982 Wharton Business School study revealed that most employers found no need to hire any replacements during strikes. Indeed, many chose not to hire replacements because they believed that doing so would make a settlement and a resumption of stable labor relations less likely. See C.P. Perry, A.M. Kramer and T.J. Schneider, Operating During Strikes, 63-66 (1982).

Even where the employer chooses to use outside replacements, all the evidence shows, in Professor Weiler's words, that "[m]any, or even most, employers can quite comfortably make do with temporary replacements." Weiler, supra, 98 Harv. L. Rev. at 391. Professor Weiler bases this conclusion, in part, on the experience of the many employers who have hired temporaries during lockouts and unfair labor practice strikes, where use of permanent replacements is unlawful, as well as on the experiences of employers who choose to use temporary replacements rather than permanent replacements. See id. at n. 132.

Two other sources provide further confirmation.

First, in most Canadian provinces the use of permanent replacements is unlawful, and employers often use temporary replacements during economic strikes. See Hearing before the Subcommittee on Labor Management Relations of the House Committee on Education and Labor, H.R. 4552 and the Issue of Strike Replacements, 100th Cong., 2d Sess. (July 14, 1988), at 47, 67 (testimony of Canadian labor law scholar that employers in Canada have generally been able to recruit temporary replacements). Indeed, many of the same employers who argue here that the prohibition of a permanent replacement strategy would be intolerable not only tolerate such a prohibition but have prospered under it in many provinces of Canada.

Second, many employers who use a permanent replacement strategy, in order to maximize their authority over both strikers and strike replacements, have presented each prospective "permanent replacements" with a prepared statement to the effect that the replacement has no legally enforceable job rights in his/her new job should the employer choose to reach a settlement with the strikers, and these employers have required each replacement worker to sign the statement prior to being hired. See Hearing Before the Employment and Housing Subcommittee of the House Committee on Government Operations, Collective Bargaining and the Hiring of Permanent Strike Replacements, 102d Cong. 2d Sess. (September 18, 1992) at 72-75. According to the Supreme Court, this arrangement -- despite the complete absence of any guarantee of permanence to the replacements -- is still sufficient to render the strikers

permanently replaced, so that they have no right to return to their jobs at the strike's close unless their employer chooses to reinstate them. See Belknap v. Hale, supra, 463 U.S. at 503. But the very fact that employers have chosen this arrangement demonstrates that they can successfully recruit replacements for the term of a strike without a grant of permanent status.

* * *

The sum of the matter is that the strike is the last resort of employees who seek to convince their employer of the relative merit of their position. When employees exercise that right, they have already come to terms with the fact that during even a successful strike -- one that puts effective economic pressure on the employer -- the employees suffer serious economic losses as well, and with the further fact that if they seek more than their employer can afford, it is their jobs as well as his business that will be put in jeopardy.

The structural constraints on the right to strike exert their own effective discipline. There is no warrant for -- and there is no justice in -- permitting employers to further their short-term interest in "winning" a strike by imposing long-term punishment on the exercise of this most basic of employee rights.

It is equally to the point that an employer who hires permanent replacements -- and who thereby discharges a senior, experienced and trained workforce -- is not seeking to prevail in a collective bargaining dispute, he is seeking to rid himself of his unionized workforce in order to reestablish his unilateral

control over the workplace.

This is a tactic that only an employer who refuses to recognize his employees' contributions to the enterprise, and who sees stable and good faith collective bargaining as an evil, finds attractive. It is no credit to today's corporate culture that such employers have come increasingly to the fore. This kind of overreaching for a short-term gain not only threatens the collective bargaining system, it threatens the long-term vitality of America's economy which depends on true labor-management cooperation based on the mutual respect that comes only from a relationship between equals.

The great social contribution of the labor laws has been to prevent misuses of management's common law rights to enhance management's own prerogatives at society's expense. H.R. 5 makes just such a contribution and should be enacted into law.

Chairman WILLIAMS. Thank you, Mr. Donahue.

I recall a discussion that one of our members had with you in your appearance here 2 years ago with regard to what I would call the "reverse spin" on this legislation. You were asked a similar question to the one I'm about to ask you. I believe you were asked to elaborate on how the ability of employers to permanently replace striking workers might actually cause or prolong work stoppages and strikes. Would you elaborate on that again for us?

Mr. DONAHUE. Surely. The pernicious effect of the doctrine is obvious, Mr. Chairman, in several ways. In the basic bargaining for a contract, the pernicious effect is that there is that moment in almost every collective bargaining arrangement when the employer leans across the table and, either explicitly or implicitly, lets the union committee know that "You have a perfect right to strike and in this country that right is protected, and if you strike, you will be permanently replaced."

That's the pernicious effect of the doctrine. He has just destroyed any semblance of balance, because now he has told the workers they won't have a temporary interruption in their work if they strike; they will have a permanent severance of this relationship. The balance is totally destroyed.

The second situation in which the employees strike and are permanently replaced, obviously the first issue on the bargaining table in any subsequent negotiation is, "Well, but all of us are going back to work, aren't we?"

"Well, no, you've been permanently replaced."

Well, it's simply impossible. God bless the union representative who can take a management offer to the workers and say, "Now, you should vote to adopt this contract. Please ratify the employers offer, but none of you are going back to work, you understand. You have been replaced." Well, I doubt very much if they will ratify the contract.

I don't know if Secretary Reich—I have been following him around this morning, so I didn't hear all of his testimony—I don't know if he cited the study by Professor Gramm from University of Alabama. She does an analysis of strikes in 1984—between 1984 and 1988. And she says that strikes lasted a mean duration—and it's a nice phrase—of 363 days when employers hired permanent replacements. The mean was 72 days when the employer used temporary replacements and only 64 days when no replacements were hired.

Certainly, all the strikes that you know of, that have been much talked about in the press, where there have been permanent replacements have certainly been prolonged, exacerbated, or have presented a situation in which you have seen union destruction, destruction of the workers, as a result of their permanent replacement.

Chairman WILLIAMS. Thank you.

Ms. Woolsey.

Ms. WOOLSEY. Thank you, Mr. Chairman.

As I'm sure you are, Mr. Donahue, I am really pleased that President Clinton and Secretary Reich are not going to go back to the drawing board, they are not going to reinvent the wheel, and they are not going to rethink H.R. 5. I am really proud of them

that they have the will to go forward so that we can bring the balance back to labor-management relations that has been missing, because I came to Congress to vote on this bill, and I'm delighted to be here, and I want to get it in front of us as soon as possible.

I have a question. What is the period of time before replaced workers are able to reenter the workforce at their previous salary, benefits, and at equal levels of responsibility? Has there been some tracking of that, and do we know how many workers have been left behind and left out of jobs at all?

Mr. DONAHUE. Well, the most comprehensive survey was the GAO report which was done in connection with the consideration of this legislation last time around. I'm thumbing and looking for it here, but I believe that the GAO report contained the gross numbers at that time. I don't know that anybody has done a study of the effect of permanent replacement as demonstrated by the length of time it takes those persons to find other employment. For one thing, that would be a condition of how long the strike is prolonged and how long the striker stays with the strike.

Clearly, the displaced worker leaving a union job may well wind up in nonunion employment and will obviously, at that point, suffer a substantial diminution of income from the job in which he or she had invested themselves over the previous 10, 15, 20 years and would suffer quite serious harm from that necessary transfer, suffer that harm from being fired. You know, we use all the nice words, but workers are fired when they are permanently replaced; the effect is no different.

Ms. WOOLSEY. As we have diminished the power of our labor organizations we have seen the demise of our middle class.

Mr. DONAHUE. Oh, I think the evidence of the diminution of the recompense for employment, the lowering of the standard of living in the United States over the last 10 or more years is very clear—10 or 14 years is very clear. I do believe that wages and conditions in this country were driven by collective bargaining for many, many years when our unions represented 30 and 35 and 40 percent of the workforce in States.

I believe that the conditions of work and of employment in many States are still driven by collective bargaining where the unions are dominant in those areas, or important and significant in those areas. And I do think that the diminution in standards, or the lowering of a standard of life, is a direct result of the debasement of wages, surely.

Chairman WILLIAMS. The gentlelady's time has expired.

Mr. Fawell.

Mr. FAWELL. Thank you, Mr. Chairman.

The inquiries that I would like to put to you are not directly in reference to the employer's right to hire permanent replacement workers, which I might add is not, in my opinion, an easy thing to do. It's not something that one takes lightly. And it is as much a last resort that one does not want to enter into as is the decision to strike, which is, I think we all agree, the last possible resort that workers want. So there are two very distasteful last resorts, which I have always felt balance things off and keep people at the collective bargaining table.

What is your opinion in regard to the fact that the bill takes from a worker the right not to strike? I say that because the bill makes it an unfair labor practice not to allow a returning worker to bump the worker who decided not to strike, for any number of reasons: that he couldn't afford it, that he had sick children at home, all kinds of things.

Secondly, in regard to recognitional picketing, what this does is bypass the need for a secret vote in reference to whether or not the employees of a given business which are being picketed really want to be represented by the union. This bill also reaches out and states that as long as there are a majority of authorizations which have been signed, that then, indeed, those employees or some employees can picket and not be subjected to the right of permanent replacement. I think of authorizations as being somewhat like how someone once described a petition—a compilation of signatures of people that don't know how to say no, oftentimes.

Then also the fact that for the rest of the workers of America, 88 percent of the private sector is now nonunion, they are not covered. I know this has been something that Mr. Williams has wrestled with and this committee has wrestled with. I think it is one of those cases where you are darned if you do, and you are darned if you don't. Because what we are doing here is, for the first time, discriminating against those who are not union members during a strike or giving special preference and special organization tools to the union workers.

Now, those are three of a number of facets of this bill other than the direct question in regard to whether or not the employer may be able to retain the rather distasteful right of hiring permanent replacement workers, and I would appreciate your comments on each of those.

Mr. DONAHUE. Sure. I would agree with you that no employer would lightly take a decision to permanently replace. No trade unionist, no worker would lightly take a decision to go on strike. The imbalance is apparent, though, in the consequences of those two decisions, not in the taking of those two decisions. The employer makes the decision to permanently replace, my job is gone forever; his business is not. If I am not permanently replaced, I am temporarily replaced, then we have a short-term interruption in our relationship.

We have had some degree of comedy, we have had a contract, we have bargained and lived together for a number of years. The strike, if it comes to a strike, is a temporary interruption in that relationship. That's how the law has always seen it. That's how we see the right to strike, a temporary interruption in the relationship. The decision to permanently replace me is a very permanent interruption of my work relationship. So the consequences of the two decisions are totally different and much more serious.

Mr. FAWELL. Since the Mackay decision, the law has held that an employer may exercise the right to permanently replace, though I think the vast majority don't; and those who do, go into bankruptcy quite often anyway. It is not a very easy decision to completely hire all new personnel.

I am more interested in what about the fact of the right not to strike. Isn't that very important? Why is this recognitional picket-

ing where you don't even have an election and yet you are held—the effect of this bill then covers a situation like that? What about the fact that you discriminate against the 88 percent of the working Americans who are not members of labor unions in the private sector? Those are perhaps more important changes in this bill and are often overlooked than is the question, which is certainly an important question, of permanent replacement hiring.

Mr. DONAHUE. All the surveys I know, sir, say that among the 88 percent who work in the private sector who are not covered by collective bargaining agreements, there is a very substantial number cited in the polls, that's somewhere between 35 and 38 percent who say they would like to join the union if they weren't frightened to do so.

Mr. FAWELL. Well, I know a lot of them who——

Mr. DONAHUE. I don't think they fit into those you are concerned with, who would like to exercise their right not to strike in the face of their colleagues' decision to strike. The first premise, the first premise of the law, is that we need to put people together and have them come to group decisions, have a democracy within that group which leads to the settlement of a discussion with the employer and the signing of a contract which is binding on everybody.

Mr. FAWELL. Well, what about the worker, though, who elects not to strike, and yet as the strike ends, the returning worker comes back and bumps him out of his job? Now, what good is that——

Mr. DONAHUE. Well, that's simply not true. That's not true, sir. Pardon me, but that's not true. If a worker in a workplace is employed before the strike, decides not to strike, continues to work through the strike, he is going to be employed after the strike. We are talking about the worker who is foreign to the workplace who is brought in as a permanent replacement of a worker, of a striker.

Mr. FAWELL. Well, excuse me. The bill changes all of that. I know what the current law is, that the worker's right not to strike under current law is protected. The job is not deemed to be vacant.

Mr. DONAHUE. Right.

Mr. FAWELL. One coming back as a returning striker has no right to bump him.

Mr. DONAHUE. That's right.

Mr. FAWELL. That is settled law, but this legislation changes that.

Mr. DONAHUE. No. I would defer to my general counsel on that subject. I do not believe what you suggest is the total truth.

Mr. FAWELL. If the returning worker comes back with greater seniority, he would bump him. It would be an unfair labor practice to give a preference, and it would be deemed to be a preference for the worker who stayed with the employer not to allow the returning striker to fill that——

Mr. GOLD. The relationship between the——

Mr. FAWELL. Is that not so?

Mr. GOLD. Well, I'm trying to answer your question, if I could. As I understand the bill, the relationship between, the seniority relationship between, somebody who chooses not to strike and somebody who chooses to strike is exactly the same before the strike and after the strike under the bill. The only change, and we think

an absolutely sound change, that the bill makes is that the decision not to strike, which the act treats as an equal decision, can't be used to advantage that person vis-a-vis somebody who was ahead of him before. That, in our view, is equity. The present situation where you have equal rights not to strike and to strike, but if you exercise the equal right not to strike, you get further ahead at the end of the strike than if you do, doesn't strike me as equity.

Chairman WILLIAMS. The gentleman's time——

Mr. FAWELL. Excuse me. If I could just——

Chairman WILLIAMS. The Chair has provided the gentleman with 10 minutes on a 5-minute time limit. The Chair would grant, if there is no objection, the gentleman 30 additional seconds to complete his thought.

Mr. FAWELL. I appreciate the Chair in so doing.

Then, I think, we do agree that if the returning striker after the strike who has greater seniority for a given position comes back, that position then is deemed vacant and he can bump the holder of that position, correct, under this?

Mr. GOLD. Just as he could before the strike, but not one iota more.

Mr. FAWELL. Well, before the strike, there is no bumping whatsoever. The current law does not allow anyone with greater seniority to come back and bump somebody with lesser seniority.

Mr. GOLD. I meant before the strike, assuming there was no strike. The only way what you say could eventuate is if after the strike there were fewer positions; and that would be just like a layoff prior to the strike, where the less senior person would be disadvantaged. And that is the equity of having that kind of system. You hypothesize a situation. The only thing you can be hypothesizing, I would think, is that the person who exercises the right not to strike ought to be in a better position at the end of the strike than he would have been in a layoff situation prior to the strike.

Mr. FAWELL. Well, my time has obfuscated.

Chairman WILLIAMS. The gentleman's time has again expired.

Mr. Payne. Mr. Payne, if you will withhold. I am trying to go by seniority, and I told the gentleman from New York that I would recognize him next.

Mr. Owens. I apologize, Mr. Owens. Thank you for looking in my direction and bringing my mistake to my attention.

Mr. OWENS. I would certainly yield to Mr. Payne. But I just wanted to make note, at this point, let the record show that we have dealt with this problem, with the freeloaders and the parasites. They will be equal to the strikers. The seniority business would prevail, regardless of the striking situation. Let's bury that issue once and for all. The freeloaders and parasites are protected.

[Laughter.]

Mr. OWENS. The important thing here, I think, Mr. Donahue, is we did build up momentum in the last session of Congress, despite the threat of a veto. You build up enough momentum, and the wisdom of the Secretary of Labor and the President is that we don't need to reserve this and delay it for a commission report, that we can go ahead and deal with this issue.

I think it's vital that we understand what the man in the street understands, that the right to strike is a fraudulent deception as

long as you allow the courts to use this licensing of the right to permanently replace people. I am glad to see we are forging ahead.

I just want to take note of the part of your testimony where you said that in the last session the only problem was that the Senate had problems cutting off a filibuster. I hope that that's correct, that that's the only problem we have. My reason for saying that is that we had much greater problems over there. But I hope you're correct, in that once the House acts—and I assure you the House will act speedily to pass this bill—that you will take care of the problems that arise in the Senate.

Mr. DONAHUE. Yes, indeed. We will certainly do our best, Mr. Owens.

Mr. OWENS. Thank you.

Chairman WILLIAMS. Mr. Hoekstra.

Mr. BALLENGER. Mr. Chairman.

Chairman WILLIAMS. Mr. Ballenger.

Mr. BALLENGER. Mr. Hoekstra, said it would be all right.

I just wanted to say one thing to Tom. Your old friend down in Nicaragua, Alvin Guthrie, told me to say hello to you, and to tell you that I do have one friend on the labor side.

[Laughter.]

Mr. DONAHUE. Oh, you have two, Mr. Ballenger.

Mr. BALLENGER. Good. I just quickly would like to mention the fact that when somebody goes out on strike, and I'm obviously picking the worst case scenario for you, you know, but when a paper worker goes out making $39,000 a year and wants more money, somebody might want that job. Or if an airline pilot making $90,000 a year walks off on a strike, there is likely to be pilots around that would like to have that job. Then I go to the $1 million football player that goes out on strike.

I think the one that really kind of struck me was the Redskins, you know, one of their fabulous winning seasons that they had, they did half the season with replacement workers; but I realize when the other guys came back, they canned them all.

It just appears to me that if a person is making that kind of money and there are people out there that would desire to have that job—and obviously you can't get somebody to take a job if he knows he is going to get fired within a week, 3 weeks, a month, 6 months—to get somebody to accept the job, you almost are put out of business.

You know, I am a manufacturer—you can say you can run it with supervisors or hired help, but not if it is a really technical business. I have a printing operation where we are running three shifts with pressmen that have taken 5 and 6 years to train and there is nobody else in the community that can do that job, to be able to operate the machines when those workers go out on strike. What you could very well end up with is a situation where either you give up and pay what they request, or you can shut the business down and go off somewhere. I hope I'm being biased enough that it doesn't make it too easy for you.

Mr. DONAHUE. I think there are disparate effects of strikes, industry by industry, and there will be different situations in the importance that the employer attaches to permanent or temporary replacement, depending upon employer attitude.

Mr. BALLENGER. Right.

Mr. DONAHUE. I would only note an aside that the Redskins might have looked good, but remember they were only playing against replacement players, and that's why.

You said someone else might want that job, and that's perfectly true. That's true of any job in America. Every job is desired by somebody else who is getting less pay in his current job or her current job.

Mr. BALLENGER. Right.

Mr. DONAHUE. But there must be some ownership interest of an employee in a job not to be thrown aside. Every one of us is repelled when we hear the story that so-and-so was fired after 15 years; they didn't like his looks. We are repelled because we think, "Gee, after 15 years, he should be entitled to something." So the fact that somebody else wants a higher paid person's job doesn't impress me at all, or would do it for less, doesn't impress me.

The arrangements under which people work, at least in the organized segment of this economy, are fixed by those people and the people they work for, and they have negotiated and arranged those conditions. I don't see anything inappropriate with that.

Mr. BALLENGER. What about the situation where there are no replacement workers available, unless you bring them in from way off somewhere? You can't even continue to operate your plant.

Mr. DONAHUE. Gee, I'm just unfamiliar, Mr. Ballenger, with those situations. You cite the problem of a printing plant in North Carolina. I would cite to you that in New York City in order to get replacement workers of a particular type and security guards of a particular type, The Daily News reached down to Tennessee. They were willing to spend the money to hire replacement workers and hire security guards even before the strike happened. I have not seen this employer inability to cope with a potential strike or strike.

Mr. BALLENGER. One more question, if I may. Those of us that are old enough can remember back in the days when the NLRB—from the Roosevelt days and so forth, it was tilted your way. Didn't the whole attitude, as far as striking replacement, come about when—I don't know when the attitude of the NLRB changed from pro-labor to maybe pro-business, but isn't that what occurred that really changed the makeup of the use of this situation?

I remember back in my younger days in business we figured, "Hell, if you're going to the NLRB, you can kiss it goodbye. There's no use even going. Why waste your money, you're going to lose."

Mr. DONAHUE. That's funny.

Mr. BALLENGER. Now at least you have a chance, or maybe you have a better than average chance.

Mr. DONAHUE. I grew up in a trade union in New York City, in a union which was primarily covered under State law, and occasionally we had to take cases to the National Labor Relations Board and we did it with great reluctance. This was in 1950, 1951, 1952, 1953, 1954. We did it with great reluctance, because the Board was probably either going to be very slow or would not give us the result that we thought appropriate. I don't know that the Board has shifted in balance from one point to another.

Mr. BALLENGER. From a guy who has watched it since the 1940s, it has.

Mr. DONAHUE. Well, you and I would, obviously, have different views of which way it was tilted at a particular time and to what extent.

Mr. BALLENGER. Right. Yes, sir.

Mr. DONAHUE. I don't think that there is a stronger example of that tilt than in the early 1980s under Chairman Dodson. That's the clearest example I know of a tilt, a pro-employer tilt, which reversed some 22 major lines of decisions. If that wasn't a tilt or an imbalance, I never saw it. That's precisely the time—I think you're right, that's precisely the time when the striker replacement, permanent replacement of strikers, urge struck so many employers in the wake of PATCO and in the wake of change, national, and in the presence of a change in the National Labor Relations Board.

Mr. BALLENGER. Thank you, Mr. Chairman.

Chairman WILLIAMS. The gentleman's time has expired.

We have four members and about 12 minutes before the vote will conclude, so let's see if we can do 2 or 3 minutes per member to ask questions.

Mr. Payne.

Mr. PAYNE. I thank the gentleman to my right—I'll yield—he was here prior to me.

Chairman WILLIAMS. Mr. Becerra.

Mr. PAYNE. Thank you.

Chairman WILLIAMS. Thank you.

Mr. Becerra.

Mr. BECERRA. Thank you, Mr. Chair.

Thank you, Mr. Payne. You were kind enough to yield to me, and I will yield it back to you. Go ahead.

Mr. PAYNE. Thank you very much.

I just have a statement. I will make it very brief, too, as related to the question of national labor relations. I just look at it the opposite way, where NLRB gave workers the right to be protected if a petition for a union was brought into the shop. As you know, prior to that, workers were fired because of union activity.

It seems odd that legislation would create the protection of the worker to, in fact, go on strike, and then turn around and say, "Then when you take that option, you will then lose your job." If that was the attitude, they should have just allowed them to be fired when they started the union activity.

It's even more painful to move along through the years and then have the Mackay Act have you terminated and not replaced. I could never understand that, and have been very involved in organizing and union shops coming in, but I could not understand that very careful protection that you get during the petition time and the vote, and then this strike replacement. Since time is very short, I just wanted to make that statement.

Thank you.

Mr. BECERRA. Thank you, Mr. Chair.

I just want to thank Mr. Donahue, Mr. Gold, and Mr. McGlotten for being here with us and for their testimony. One quick observation. Unlike the Chair, I did not experience permanent replacement while I was employed as a union member, but I did grow up

and have been in a family for three generations that has been a union family, so I know the value of being organized and having the opportunity to be protected by a union.

I just have one question. There is always the specter of a loss of competitiveness raised by strapping business with this type of legislation. I was wondering if you could just comment and give us your own thoughts on that particular suggestion?

Mr. DONAHUE. Sure. I think the evidence is clear that the most productive workplace is the workplace in which the worker has the highest degree of involvement and the highest stake in decent conditions and in decent productivity, and where there is a healthy relationship between the employer and the represented employee. The academic studies are now piling up to this fact.

I think that that's precisely what we need, that's precisely what Secretary Reich is testifying about. There is nothing more destructive of that relationship than to destroy the process of bargaining by which people come to agreements with which they will live for a 3-year period or however long the contract may be. The threat of permanent replacement in a negotiating context is as destructive of that relationship as the act of permanent replacement, because it destroys the ability of people to talk and solve their short-term differences.

Chairman WILLIAMS. Mrs. Roukema.

Mrs. ROUKEMA. Mr. Chairman, I had some questions, but I'll tell you, in the interest of time, I'm simply going to observe to our witness here today that where we started out with the Chairman's question to you about the pernicious effects of the doctrine here, as destroying the balance, that, sir, is exactly the problem on the reverse side, vice versa, which is management's objection to this bill because it will upset the balance.

I wish we could come to sort of an agreement here as to how we can reform the National Labor Relations Board activities, maybe take a leaf out of the book of the arbitration that was used in the Pittston—yes, Pittston Coal Strike and Caterpillar, and take some lessons and use that as a fashioning for better labor relations and reform. It seems apparent that we are not going to reach that here today.

Thank you very much.

Mr. DONAHUE. Thank you.

If I may just comment. Mrs. Roukema, the question is, is there balance? If you believe that the evidence of the last 10 or 15 years shows a balanced system of labor relations, then your position is correct; I do not. I do not believe what you have seen is a balanced system of labor relations. I don't think Pittston resulted from a balanced collective bargaining relationship—I don't think Greyhound, I don't think Eastern, I don't think any of those——

Mrs. ROUKEMA. No, no. Pittston had to rely on the arbitration system, but it seems as though the juggernaut here is the delays at the National Labor Relations Board that does not act expeditiously and in a time frame where either labor or management's economic concerns can be adjudicated. It's too long a discussion for the time we have.

Mr. DONAHUE. All right.

Chairman WILLIAMS. Mr. Donahue, thank you very much for being with us today.

We have two witnesses left, Mr. Nash and Mr. O'Connor, and as soon as this vote is concluded, the subcommittee will return to hear their testimony.

Again, Mr. Donahue, thanks a lot for being with us, as well as your colleagues, Mr. Gold and Mr. McGlotten.

Mr. DONAHUE. Thank you very much, Mr. Chairman.

Chairman WILLIAMS. The committee is in recess.

[Recess.]

Chairman WILLIAMS. I call back to order the hearing of the Labor-Management Relations Subcommittee on the legislation, H.R. 5.

We ask now our next two witnesses to join us. I see they have.

We, first, want to thank both of you for your patience. It seems to be the lot of these subcommittees that everybody, of course, wants a full opportunity to question the witnesses, and then time intervenes and we find that attendance in the last half of the hearing is sometimes diminished. I hope that won't be true today.

I will tell the two witnesses as well as the members that it is likely that within about 15 minutes, or rather 25 minutes, we are going to have another series of votes which probably will require our absence from the hearing room for a considerable time. So perhaps we can complete the hearing within a half-hour or less.

We have with us a former general counsel of the National Labor Relations Board, Mr. Peter Nash, and also Mr. Donald O'Connor.

Mr. Nash, we will begin with you. Thank you very much for accepting our invitation to be with us today.

STATEMENTS OF PETER NASH, FORMER GENERAL COUNSEL, NATIONAL LABOR RELATIONS BOARD, WASHINGTON, DC; AND DONALD P. O'CONNOR, PARTNER, LABOR AND EMPLOYMENT LAW SECTION, BUCHANAN INGERSOLL PROFESSIONAL CORPORATION, PITTSBURGH, PENNSYLVANIA

Mr. NASH. Thank you, Mr. Chairman.

It's a pleasure to be back before this committee. My name is Pete Nash, former general counsel to the NLRB, former solicitor at the U.S. Department of Labor. It's a great privilege and honor to follow my good friend Tom Donahue, and he would think me remiss if I didn't remark that it's always a pleasure to be in his company, wrong as he may be.

We are here to talk today about H.R. 5, which prohibits an employer from hiring permanent replacements in any situation in which a union is certified or recognized or where a union has filed a petition within the last 30 days for an election supported by cards from a majority of people in the appropriate unit.

Let me direct my attention first to the overall prohibition. I believe that that prohibition is not needed. We have heard a good bit of testimony here today and throughout the last several years about how the use of permanent replacements is a new phenomenon in American labor law. My experience would indicate that that is just not the case.

I have dealt with scores of permanent replacement cases during my 4 years as general counsel of the National Labor Relations Board. And a study done by the Employment Policy Foundation indicates, that prior to 1981 or the 1980s, in fact, hundreds of situations found their way to an ultimate NLRB decision involving permanent replacements, and those are only NLRB decisions.

As you know, NLRB complaints are issued in only about one-third of the charges filed, so that there would be probably at least a triple number of charges filed involving permanent replacement cases. Furthermore, there were permanent replacement situations where no charges were ever filed. So to claim that this is a new phenomenon, the use of permanent replacements, in my experience and based upon the studies that have been done, is just not accurate.

Furthermore, existing law is carefully balanced, thus a balance would be destroyed by H.R. 5. In the first place, employees who go out on strike in response to an employer's unfair labor practices may not be permanently replaced. Employees who are locked out may not be permanently replaced under existing law.

The only employees who are subject to permanent replacement are those who voluntarily choose, on their own, to go out on strike or to declare economic warfare against their employer in search of better wages or working conditions. Under those circumstances, an employer has an equal right, recognized in the law since the late 1930s, to continue to run that business, and in order to be able to continue to run that business, to hire permanent replacements.

Furthermore, those permanent replacements are not, in fact, fired. They retain a right to come back to work when vacancies occur. They retain a right to be on a preferential hiring list. After the strike is over, they may vote in NLRB elections held within a year after the start of the strike. They retain all of their seniority for layoff bidding, bumping, and vacation purposes when they come back to work.

Finally, and something vastly overlooked it seems to me in the debate so far, very often those permanently replaced strikers, in fact, return to work the day after a strike is over pursuant to an agreement reached at the bargaining table between the employer and the union. Those replaced strikers will be returned and the permanent replacements will, in fact, be terminated. There are scores of those situations every year going on in this country.

Furthermore, existing law is consistent with the National Labor Relations Act. The National Labor Relations Act was not passed to encourage strikes; it was passed to encourage collective bargaining, and collective bargaining which would result in agreements reached between the parties. Economic weapons were held by both the employer and the union to move and motivate the parties to come to that agreement.

Employees and their union have a right to go out on strike, to threaten the very existence of a company. That provides an incentive for the company to settle. Employees if they go out on an economic strike may be permanently replaced, providing an incentive for those employees and the union that represents them to settle. To eliminate that incentive on one side and to enhance the ability of the union to destroy the company on the other shifts and sub-

stantially unbalances, if you will, the playing field from what has existed for years and years.

Furthermore, existing law is consistent with economics. Employees who go out on strike for more money are basically saying to their employer, "We think that our jobs deserve more money and that, in fact, in the free marketplace we could make more, and that's what we are insisting upon." An employer who has the ability to hire permanent replacements tests that economic theory and whether or not those employees engaged in that kind of work can be hired—whether employees can be hired more cheaply.

Under the H.R. 5, that economic balance is gone, that economic test is gone, because an employer may not offer permanent replacement or permanent jobs to employees and test the economic insistence of the union that went out on strike.

Finally, in terms of the overall, H.R. 5 may be counter to employee interests in a lot of different ways. For example, an employer who is a supplier to the auto industry that's shut down and may not continue to work, because it can't hire permanent replacements, may ultimately not be able to get those goods and services to the auto industry and may close scores of unionized auto plants as a consequence, putting union workers out of work.

Construction companies who are using 10 to 15 different trades on a job may if they cannot permanently replace individuals who are working on an early part of that job, may end up delaying or substantially eliminating the opportunity for unionized workers to subsequently come on that job in those organized trades and work, so that H.R. 5 may have direct adverse impact and direct adverse consequences to union-represented employees.

Finally, in terms of the overall impact of this bill, an employer faced with a strike cannot continue to operate without hiring permanent replacements would, under H.R. 5, be hoisted on the horns of a dilemma. He could take the strike and go out of business immediately, because that's what the strike is intended to do, thus ultimately resulting in the loss of jobs for all of the employees in that unit. Or the employer can capitulate to the economic demands which make the company no longer competitive and go out of business over a longer period of time, resulting once again in the loss of the business and the loss of those jobs.

Dealing with a more micro-issue, and that is, the question of whether permanent replacements ought to be able to be hired during a time when a union has filed a petition for an election, basically what this bill would do would be to allow a union to substitute a strike for an NLRB election.

It doesn't seem to me to make a whole lot of sense to substitute strike activity for the free choice by employees in a secret ballot election as to whether or not they wish to be represented by a union. Indeed, it is that kind of issue, peculiarly, that, it seems to me, ought to be left to the Secretary of Commerce's and Labor's panels who are discussing the overall labor laws in this country, i.e., Does it make sense to substitute a strike for an NLRB election?

Furthermore, you will encourage those kinds of strikes under H.R. 5; and in addition, you may lengthen or produce additional NLRB hearings, for an employer subject to a recognitional strike where a petition has been filed will have a motivation to litigate

what is the size of the unit in order to determine whether the signatures really represent 50 percent of the overall unit. The present record of the NLRB, where over 80 percent of all elections are held on stipulations or consents may, in fact, be injured by a provision which allows the union to go out on strike if they have a 50 percent showing of interest in support of an election petition.

In conclusion, in my view, H.R. 5 is bad for business, it's bad for workers. Either way, under H.R. 5, businesses and employers are hurt. In a word, I think H.R. 5 is nuts.

Thank you.

[The prepared statement of Peter Nash follows:]

H.R. 5
STRIKER REPLACEMENT BAN

WRITTEN STATEMENT OF PETER G. NASH
OGLETREE, DEAKINS, NASH, SMOAK & STEWART

March 30, 1993

Mr. Chairman and members of the Subcommittee: My name is Peter G. Nash. I am a partner in the law firm of Ogletree, Deakins, Nash, Smoak & Stewart, with offices in Washington, D.C. Before entering private practice, I served as General Counsel of the National Labor Relations Board from 1971 to 1975 and before that as Solicitor of the U.S. Department of Labor from 1970-1971. Thank you for providing me the opportunity to testify regarding H.R. 5, which would have the primary effect of prohibiting employers from hiring permanent replacement workers during the course of an economic strike.

INTRODUCTION

Notwithstanding the vehemence with which the proponents of H.R. 5 have argued for a strike replacement ban, I believe that the proposed legislation is fundamentally flawed in two important respects.

First, the bill runs counter to the very purpose of the federal labor relations laws, which is to facilitate the resolution of disputes between employers and employees within the general confines of a competitive marketplace. The National Labor Relations Act (NLRA) protects the rights of employees to organize and bargain collectively, but it also protects the rights of employers to manage and carry on their businesses. As the Supreme Court has recognized, the purpose of the NLRA is not to dictate a particular result. H.K. Porter v. NLRB, 397 U.S. 99 (1970). Passage of the strike replacement legislation, however, could dramatically

alter the fundamental purpose of the NLRA by preventing an employer from engaging in economic self-help through the hiring of permanent replacements and, in essence, unduly influence the result in a strike situation in favor of the union. Particularly in a time when American industry faces ever mounting competition from around the world, I respectfully suggest that our nation hardly needs legislation designed to encourage strikes and a resulting loss of competitive standing.

Second, the situations in which an employer may hire permanent replacements are limited under current labor laws, and sufficient protections already exist to prevent employers from discriminating against or otherwise unduly penalizing strikers. Indeed, the only time an employer is privileged to permanently replace strikers is when those strikers freely decide when and if to declare economic warfare on an employer. Under these circumstances, it hardly seems unfair to allow an employer to defend itself by hiring a replacement workforce.

I. THE NLRA: BALANCING COMPETING ECONOMIC INTERESTS AND BARGAINING WEAPONS

A. Bargaining Weapons.

The NLRA was "designed to promote peace by encouraging the making of voluntary agreements governing relations between unions and employers." NLRB v. American Nat'l Ins. Co., 343 U.S. 395, 401-402 (1952). This process of "ordering and adjusting" competing employer and employee interests was described by the Supreme Court as "the keystone of the federal scheme to promote industrial peace." Teamsters Union v. Lucas Flour Co., 369 U.S. 95, 104 (1962). An integral part of this process is the use of economic pressure by both

employers and unions to achieve bargaining goals. As the Supreme Court stated in NLRB v. Insurance Agents International, 361 U.S. 477, 489 (1960):

> The presence of economic weapons in reserve, in their actual exercise on occasion by the parties, is part and parcel of the system that the Wagner and Taft Hartley Acts have recognized.

The union's most potent economic weapon is the strike. "The economic strike against the employer is the ultimate weapon in the labor arsenal for achieving agreement upon its terms...." NLRB v. Allis-Chalmers Mfg. Co., 388 U.S. 175, 181 (1967). The right to strike is expressly recognized in Section 13 of the NLRA and is considered to be protected activity under Section 7. However, despite the solicitude for the right to strike expressed in the NLRA, it should not be forgotten that to a very large extent the enactment of our national labor laws was driven by the desire to avoid strikes and the attendant economic and social disruption caused by such industrial strife. In other words, our national labor laws were enacted to further the salutary goals of freedom of association and collective bargaining -- not the increase in strike activity. The union's right to strike, therefore, should not be elevated to being a goal of our collective bargaining process. Rather, the right to strike is simply one possible component in that process -- one "weapon" in the union's arsenal, albeit the most powerful and destructive.

To counteract the unions' "arsenal" of economic weapons, including the strike, employers possess various economic defenses to preserve their ability to continue operations. Among these defenses is the right to hire replacements for striking employees. This right was first recognized by the Supreme Court in NLRB v. Mackay Radio and Telegraph Co., 304 U.S. 333, 345-347 (1938), and since then has been largely unquestioned. The "very purpose of enabling an employer

to offer permanent employment to strike replacements is to permit the employer to keep his business running during the strike." Belknap v. Hale, 463 U.S. 491, 518 (1983).

Publicity concerning an employer's resort to hiring permanent replacement workers has been especially prominent in recent years. The hiring of permanent replacements is anything but a recent phenomena, however. Indeed, a study by the Employment Policy Foundation confirms my own experience as NLRB General Counsel that NLRB cases involving the hiring of permanent replacements have remained relatively constant since the Supreme Court issued its Mackay decision.

The hiring of permanent replacements, therefore, has long been recognized as constituting part of the legitimate self-help available to employers in a strike situation and allows the dispute between the employer and its employees "to be controlled by the free play of economic forces." Machinists v. Wis. Employ. Rel. Comm., 427 U.S. 132, 140 (1976) (quoting NLRB v. Nash-Finch Co., 404 U.S. 138, 144 (1971)). This free play of economic forces has been characterized as "the clash of weapons used by employer and unions against one another." Belknap at 521.

B. The Economic Issues

The Supreme Court has traditionally spoken of these economic weapons and defenses in terms of "rights": that is, an employee's right to strike and a company's right to continue business. However, recognition of these rights has an underlying economic justification. Under the labor laws, employees certainly have the right to engage in concerted activity and to withhold their labor when they believe that they are not being paid wages commensurate with what market conditions would allow. For example, employees being paid five dollars an hour

might go out on strike if they believe that given their value to the employer and market conditions, they should receive seven dollars an hour.

The ability of an employer to hire permanent replacements tests these employee demands in the crucible of the marketplace. An employer's attempt to operate during a strike by hiring permanent replacements provides an important market check on a union's demands. Thus, in our example, if an employer cannot hire permanent replacements for less than seven dollars an hour, then the "free play of economic forces" will likely dictate that the employees will be successful in their strike and receive a higher wage. On the other hand, if more than a sufficient number of replacements can be hired at the existing wage of five dollars an hour, the same free play of market forces will result in the strike proving unsuccessful.

If an employer is denied the ability to hire permanent replacements, market forces will not be allowed to operate freely to determine the outcome of the dispute between the employer and employee. Rather than the market dictating the result, the proposed strike replacement legislation would allow the union to tilt the balance in its favor.

As a consequence, both sides to the labor dispute could lose. If an employer refuses to give in to a union's noncompetitive wage demands and cannot hire replacement workers to continue operations, the company may well become so weakened competitively that it can no longer continue operations. On the other hand, if an employer gives in and accedes to a union's demands, the company may be unable to absorb or pass through the higher labor costs in the competitive market place and, as a result, also be forced to curtail operations. In either

scenario, it is the employees who ultimately are harmed when their wage demands are not tested by market mechanisms.

II. LIMITS ON AN EMPLOYER'S RIGHT TO REPLACE STRIKING EMPLOYEES

The right of an employer to permanently replace striking employees, as recognized by the Mackay court, is not without limit. For employers governed by the NLRA, permanent replacement is available only in the case of an economic strike by employees who seek to force their employer to improve wages and working conditions. Permanent replacements may not be hired for strikers who are protesting their employer's unfair labor practices or during an employer-instigated lockout. Also, although an employer may permanently replace striking employees when faced with an economic strike, the employer may not discharge an employee for engaging in strike activity. Consequently, even if the striking employee's job is filled by a permanent replacement, the striking employee is entitled to certain reinstatement rights when and if a vacancy later occurs. Finally, economic strikers remain eligible to vote in representation elections, and the NLRB does not assume that strike replacements are presumed to oppose the union.

In short, although an employer may use a variety of economic defenses to counter the union's strike weapon, certain limits are placed on the economic conflict to guarantee the continuation of the bargaining relationship at the strike's conclusion.

A. Unfair Labor Practice Strike

It should be emphasized that an employer's right to hire permanent replacements arises only in the case of an economic strike -- not an unfair labor practice strike. An unfair labor practice (ULP) strike is strike activity initiated in

whole or part in response to unfair labor practices committed by the employer. When such a strike occurs, employees engaged in the strike are entitled to immediate reinstatement to their former jobs upon an unconditional offer to return to work. Mastro Plastics Corp. v. NLRB, 350 U.S. 270 (1956); Pencheur Lozenge Co., 98 NLRB 496 (1952), enf'd as mod., 209 F.2d 393 (2d Cir. 1953). Indeed, as the Supreme Court recognized in Mackay, ULP strikers must be reinstated, even if the employer has hired permanent replacements and even if those permanent replacements must be discharged.

B. Lock Outs

When an employer undertakes a lock out, it also may not hire permanent replacements to take the jobs of those locked out, as would be the case in an economic strike situation. It is thought that the hiring of permanent replacements in a lockout situation "is too laden with the potential for destroying the bargaining relationship" to be permitted. Estreicher, "Strikers & Replacements," 38 Labor L.J. 287, 292 (1987). There are circumstances, however, in which the employer can lock out and continue operations with new employees, but those employees must be temporary -- not permanent -- replacements. Intercollegiate Press, 199 NLRB 177, aff'd, 485 F.2d 837 (8th Cir. 1973). The Board follows the rule that an employer may use temporary replacements to continue operations during an otherwise lawful lockout where there is no "specific proof of anti-union motivation." Harter Equip. Co., 280 NLRB 71 (1986), aff'd sub nom., 829 F.2d 458 (1987).

C. Economic Strike Protections

1. Reinstatement Rights of Economic Strikers

Because an economic strike is deemed to be protected activity under Section 7 of the NLRA, it is well established that an employer may not discharge an employee for engaging in any economic work stoppage. As a result, replaced strikers remain statutory employees, entitled to protections under the Act. Thus, if an economic striker's job has not been filled by a permanent replacement, he or she may apply for reinstatement when the strike ends. Upon receipt of an unconditional request for reemployment, the employer is generally under an obligation to reinstate the striker if a vacancy exists.

Even if the employer has abolished jobs during the strike, it is obligated to reinstate strikers when their jobs are reestablished unless the employer can show "legitimate and substantial business justifications" for failing to do so. NLRB v. Fleetwood Trailer Co., 389 U.S. 375, 378 (1967) (citing NLRB v. Great Dane Trailers, 388 U.S. 26, 34 (1967)).

An employer's obligation to replaced economic strikers was expanded by the NLRB in its 1968 decision in Laidlaw Corporation v. NLRB, 171 NLRB 1366, enf'd, 414 F.2d 99 (7th Cir. 1969), cert. denied, 397 U.S. 920 (1970). Under the Laidlaw doctrine, replaced economic strikers are entitled to priority in rehiring once the strike is over.

Furthermore, the fact that the employee's old job may be occupied has been held to be no excuse for the employer failing to offer reinstatement if another job for which the striker is qualified becomes available. NLRB v. W.C. McQuaide, Inc., 617 F.2d 349, 353 (1980). Additionally, economic strikers retain their rights to jobs that are substantially equivalent to the ones they held prior to the strike even

after they have been rehired at lower-level positions and discharged for poor performance. David R. Webb Co. v. NLRB, 888 F.2d 501 (7th Cir. 1990).

2. Nondiscrimination protection

In addition to the restrictions on the replacement of economic strikers noted above, an employer also may not discriminate between union and nonunion applicants in hiring replacements. For example, the NLRB held in Charge Card Association, 274 NLRB 835 (1980), that an employer may not condition reinstatement upon workers accepting probationary status for a period of time. Likewise, an employer may not refuse reinstatement to economic strikers and then hire nonstrikers to fill jobs that the strikers were qualified to fill. Actors Equity Assoc. (John Clark), 247 NLRB 1193 (1980).

Further, an employer may not offer inducements to favor the nonstriker or replacement over the striker in such a manner as to destroy the power to strike. For example, in Erie Resistor, the Supreme Court upheld the Board's determination that an employer illegally discriminated against strikers by offering "super seniority" to strikers who abandoned the strike and also to replacements, so that in the event of a layoff the less senior employees (strikers) would be laid off first. It is also unlawful for an employer to grant a retroactive wage increase to nonstrikers if the increase is greater than the increased offer to the union during negotiations and the purpose of the increase is to disparage union membership. Soule Glass and Glazing Co., 246 NLRB 792 (1979).

Inducements need not be economic in nature to be illegal. Hence, the employer's requirement that only those being reinstated take a physical exam has been held to violate the NLRA. Craw and Son, 244 NLRB 241 (1979). Moreover, absent a legitimate purpose, an employer may not deny benefits to qualified

strikers while granting such benefits to nonstrikers. An employer therefore illegally discriminates against strikers by denying vacation benefits accrued under the expired contract or granting the same benefits to non-strikers. Great Dane Trailers, supra. And, it has been held unlawful for an employer to terminate sick and accident benefits for employees physically unable to work or to require disabled employees to disavow strike action in order to receive disability benefits. E.L. Wiegand Division v. NLRB, 650 F.2d 463 (1981), cert. denied, 455 U.S. 989 (1982)

These various restrictions on an employer's options when faced with a strike may be seen as having the same goal: preventing employers from using measures that may completely destroy the bargaining relationship. Moreover, the restrictions have an underlying economic rationale. If exceptional lures (such as super seniority or retroactive wage increases) or punishments (such as denying accrued vacation or terminating accident benefits) are used to induce workers to cross picket lines, the market process will not act as a check upon the economic positions of both the employer and the union. The willingness of strikers to return to work on the basis of the employer's final offer sends the market signal that the union's demands are not in tune with economic reality. On the other hand, if the employer must offer extraordinary benefits -- not reflective of what the benefits will be at the strike's end -- to induce crossovers, then the market signal is distorted and the result of the strike will not necessarily reflect the proper free interplay of market forces.

3. Strikers' voting rights

Although economic strikers may lose their right to immediate reinstatement, under the NLRA they may continue to remain eligible to vote in a representation

election held with twelve months of the commencement of the strike. 29 U.S.C. Section 159(c)(3); Bioscience Labs v. NLRB, 542 F.2d 505, 508 (9th Cir. 1976). Indeed, the NLRB has held that a striker retains the right to vote absent some affirmative action, other than replacement, indicating that the striker's employment has ended. W. Wilton Wood, Inc., 127 NLRB 1675, 1676-1677 (1960). Sufficient action may include the acceptance of permanent employment elsewhere, elimination of the job, discharge, or denial of reinstatement for conduct rendering the employee unsuitable for reemployment. As a practical matter, striking employees continue to remain eligible to vote during the statutory twelve month period since it is virtually impossible for an employer to demonstrate that a striking employee has taken an affirmative action sufficient to render that employee ineligible to vote.

4. Decertification of a union

Oftentimes, after the end of an economic strike during which the employer hired permanent replacements, the question arises as to whether the union still maintains majority status among the remaining employees. For a time, the Board flip-flopped back and forth over whether strike replacements should be presumed to oppose or to support the union. Finally, in 1987 the Board determined that no universal generalizations could be made about the union sentiments of replacement workers which would justify a presumption of either support for or opposition to the union. Station KKHI, 284 NLRB 1339 (1987). Accordingly, the Board adopted a no-presumption standard regarding the union sentiments of striker replacements and now determines the view of employees on a case-by-case basis. This Board rule recently was upheld by the Supreme Court in NLRB v. Curtin Matheson Scientific, Inc., 110 S. Ct. 1542 (1990).

Hence, by simply hiring permanent replacements, an employer cannot seek to destroy the existing bargaining relationship and have the union decertified based on mere presumption. Rather, given the Board's rule, as upheld by the Supreme Court, specific evidence of anti-union sentiment must be presented by the employer.

CONCLUSION

A company's right to hire permanent replacements during the course of an economic strike in order to keep its operations going simply is part and parcel of the free market interplay which the NLRA was designed to foster. It does not create an unfair advantage to the employer during labor disputes. In fact, to prevent an employer from continuing to operate its business through the hiring of permanent replacements would tilt the economic playing field decidedly in favor of the union.

Furthermore, under existing law, striking employees may be replaced permanently only when they themselves decide to declare economic war upon their employer. They may not be permanently replaced when their employer locks them out or when their employer commits unfair labor practices prompting or extending their strike action. Only when the employees freely elect to strike and shut down their employer's business may they be permanently replaced. And even then, there are numerous safeguards to protect striking employees from unfair or coercive conduct by employers and to ensure that strikers have an enforceable claim to their old jobs when they become available. In light of these protections, there simply is no basis for the claim that the permanent replacement of economic strikers is unfair or that legislation is necessary to outlaw such replacements.

Chairman WILLIAMS. Thank you.

Mr. O'Connor, thank you for being with us. We look forward to your testimony.

Mr. O'CONNOR. Thank you, Mr. Chairman and members of the subcommittee who are here. I do ask that my written statement that was filed yesterday, I believe, be made part of the record.

My name is Donald O'Connor, and I am a management labor attorney and a partner in the Pittsburgh-based law firm of Buchanan Ingersoll. In 27 years that I have been a practicing labor attorney, I have negotiated in excess of 150 labor agreements. In most of those negotiations, agreements were achieved without any work stoppage. Occasionally, however, strikes unfortunately did ensue. In virtually every case I have been involved in, the employers who did decide to operate during the strike have ruled out the use of permanent strike replacements.

Our firm, generally, counsels our clients against the use of permanent replacements. We have told them that the hiring of permanent replacements should be a choice of last resort because it usually is associated with strike violence, public relations problems, and costly litigation. In the over 150 contracts that I have negotiated, only one employer chose to use permanent replacements. I will talk about that in a minute.

I should say, that prior to 1981, I had two cases involving permanent replacements where I was not the negotiator but dealt with problems associated with the use of permanent replacements. So I've had three cases, two before 1981, one after. That case, the hospital strike that I referred to, was a 150-day strike in 1981 at an acute care hospital near Pittsburgh.

The story of that strike provides a case study why H.R. 5 should not be adopted. In May 1991, Canonsburg General Hospital, then in the eighth week of a 150-day economic strike, hired 52 permanent replacements. That strike, which was called by District 1199–P of the Service Employees International Union, was then the longest strike in Pennsylvania history. The strike ended when both sides reluctantly agreed to settle their differences by going to binding arbitration. Though a far from perfect solution, the use of the permanent replacements was effective in helping the hospital serve its patients; and at the same time, supply the impetus necessary to bring an end to the strike.

Canonsburg General Hospital served a largely aging population in Washington County, Pennsylvania, about 25 miles south of Pittsburgh. A portion of the hospital's employees there were service and maintenance employees, represented by District 1199 since 1976. The 1991 strike was the first strike that hospital ever experienced.

The hospital faced the prospect of its labor costs increasing at a much faster rate than increases it expected from medicare, medicaid, and Blue Cross/Blue Shield payments. There was a very distinct possibility that its expenses, including labor, if not controlled would in the near future exceed its income and challenge the viability of that hospital. In order to remain economically viable and to survive into the 21st century, the hospital felt it had no other alternative than to reject what it considered excessive union demands.

The hospital made a final economic offer which would have increased its total labor cost over a 3-year period by 8.9 percent, an amount it felt would reflect increases it would be receiving over the 3-year period from medicare and medicaid. That proposal also asked employees to share in a portion of the hospital's cost of providing group medical insurance benefits to the employees and their dependents. Under the old contract, the employer paid for everything.

The union countered with a package that would have increased its cost over a 2-year period, not a 3-year period, by 13.3 percent and would have done nothing to help ease the pressure on the hospital with respect to group insurance costs.

When the strike began, the hospital was concerned about the ability to continue to operate and provide its patients with high-quality health care without any disruption in service. Two short-term solutions were found. First, management and nurses would increase their responsibilities and went onto 12-hour, 6-day-a-week schedules. Second, the hospital hired some 45 temporary replacements and made a conscious decision not to hire permanent replacements. Those solutions worked for a while. But after 8 weeks, the hospital became very concerned about employee burnout of working 72 hours a week, week in and week out, and no resolution in sight.

To continue to provide quality services, the hospital reluctantly considered hiring permanent replacement workers, especially in critically-skilled positions such as certified nursing assistants, medical transcriptionists, and coders—skills that people were not willing to come to on a temporary basis. The only way the hospital could successfully recruit qualified personnel in those categories was to entice them to leave permanent employment elsewhere by taking permanent employment with the hospital.

Predictably, the announcement caused a public outcry. District 1199–P accused the hospital of trying to break the union, which was not true.

In the months that followed, more than 200 workers and demonstrators were arrested for violating court orders limiting the number of pickets at the hospital entrances and prohibiting the blocking of entrances. During one mass rally, there were in excess of 700 union supporters at the hospital interrupting service at the entrance to the hospital.

Judge Thomas Gladden, President Judge of the Court of Common Pleas for Washington County, found the union and its leaders, including the president of District 1199–P, in contempt of court on two separate occasions and imposed two separate civil fines of $10,000 each. In addition, he ordered the union to put up a surety bond of $25,000 to cover hospital costs.

By August of 1991, both sides were frustrated and groping for a settlement. Towards the end of August, while the union chief negotiator was in jail for picket-line misconduct, the chairman of the Washington County Commissioners stepped into the fray and attempted to mediate a settlement.

During a 48-hour negotiating marathon, the parties ultimately agreed to settle the strike by agreeing to submit to binding arbitration unresolved economic issues and agreeing, the hospital agree-

ing, and reluctantly going back on a promise it made to the permanent replacements—but with no other choice—to return the striking employees to their positions, but laying off those who were permanently replaced rather than fire them. So they went onto a layoff status.

The parties selected Arthur Porter, a labor economist and arbitrator from Ohio, to act as a neutral arbitrator to resolve the economic differences. In February 1992, after 5 days of hearings, Mr. Porter handed down his decision which was virtually identical to the hospital's final offer, awarding wage and benefit increases of 9.1 as contrasted to 8.9 percent, some two-tenths of a percent.

In addition, Mr. Porter's award agreed with that the employee should pay a portion of their group insurance. Mr. Porter, in his award at page 7 said, "Finally, there is little financial relief and prospect for small general hospitals, such as Canonsburg General. The gap between costs and payment is slated to widen under medicare. Medicaid is likely to remain stagnate or decrease as to payments."

In conclusion, I think all of us would have to agree, that absent putting its patients out onto the street, Canonsburg General Hospital had no other alternative than to hire permanent economic replacements when faced with the situation it had. In my opinion, had the hospital not used permanent replacements, the strike would have lasted longer and the settlement would have been substantially greater.

As a matter of fact, that's exactly what happened at Portersville Hospital and Warren Clinic in Portersville—Pottsville, I'm sorry—Pottsville Hospital and Warren Clinic in Pottsville, Pennsylvania, this last year. That 200-bed hospital experienced a 190-day strike involving the very same union, District 1199–P, which ended this past February.

It was not until the hospital threatened to hire permanent replacements, after being on strike for half a year, that the union finally agreed to settle that strike. Even at that, the settlement was very inflationary, the wages for technicians was 8 percent for technicians, and 5 percent in the second year I'm told; and for other employees, it was 5 percent in the first year and 4 percent in the second.

Mr. Chairman and members of this committee, as you know, the indices of what is being negotiated now, that's inflationary. The cost of living is about 3 percent, negotiated settlements are in the neighborhood of 3 to 3.4 percent, and medicare is being increased at a rate of 3 percent. That hospital got squeezed badly. It was only after they threatened to use permanent replacements that the union finally got serious and settled.

In my opinion, H.R. 5 would not be in the best interest of our economy. We don't tamper with the fine balance ecologically, and we protect our ecology. We should protect our economy by maintaining the fine balance between the employee's right to strike and the employer's ability to operate when its back is to the wall.

I thank you for the invitation, and I welcome any questions you may have.

[The prepared statement of Donald P. O'Connor follows:]

STATEMENT OF DONALD T. O'CONNOR, ESQUIRE

My name is Donald O'Connor. I am a management labor attorney and a partner with the Pittsburgh-based law firm of Buchanan Ingersoll Professional Corporation. In the 27 years that I have been a practicing labor attorney, I have negotiated in excess of 150 labor agreements, many of which have been negotiated since 1981, with a myriad of unions and in a broad array of industries. In most of those negotiations, agreements were achieved without any work stoppage. Occasionally, however, strikes unfortunately did ensue. In those situations, the employers were often faced with the difficult decision of whether they should continue operations during the strike. In virtually every case I have been involved in, the employers have ruled out the use of permanent strike replacements. Our firm generally counsels our clients against the use of permanent replacements. We have told them that hiring permanent replacements should be a choice of last resort because it usually is associated with strike violence, public relations problems and costly litigation. In the over 150 contracts that I have negotiated, only one employer chose to use permanent replacements, and that was because they felt they had no other choice. That case involved a 150 day strike in 1991 at an acute care hospital near Pittsburgh[1].

The story of the 1991 hospital strike provides a case study of why H.R. 5, which would prohibit the use of permanent strike replacements, should not be adopted.

In May 1991, Canonsburg General Hospital, then in the eighth week of a 150 day

[1] Prior to 1981, I was involved in only two strikes where permanent economic strike replacements were used. However, I was not the chief negotiator in either of those cases.

economic strike, hired 52 "permanent" replacement workers. That strike, which was called by District 1199P of the Service Employees International Union, was then the longest hospital strike in Pennsylvania history. (Last year that same union had a hospital out on strike for 190 days in the Pottsville, Pennsylvania area.) The 150 day strike at Canonsburg ended when both sides reluctantly agreed to settle their economic differences by way of binding arbitration.

Though a far from perfect solution, the use of permanent replacements was effective in helping the hospital serve its patients, and at the same time supplied the impetus necessary to bring an end to the strike.

Background

Canonsburg General Hospital serves a largely aging population in the Washington County area, about 25 miles south of Pittsburgh. With 120 beds, it provides acute and skilled nursing care services, utilizing the services of approximately 550 employees. A portion of the hospital's employees, those who provide nutritional, housekeeping, nursing assistance, and maintenance services, have been represented by District 1199P since 1976. The 1991 strike was the first strike in their 15-year relationship. Of the five prior contracts between the parties, I had negotiated four of them.

Like most hospitals, Canonsburg's revenue is based largely on Medicare, Medicaid and Blue Cross payments. As a result of Medicare's change to a prospective payment system in 1983, and other actions taken by federal and state government to control rising health care

costs, the hospital in 1991 had modest margins on Medicare patients and lost money on Medicaid patients, and the reimbursement environment was getting tougher each year. The hospital faced the prospect of its labor costs increasing at a much faster rate than the increases expected from Medicare, Medicaid and Blue Cross/Blue Shield. There was a very distinct possibility that its expenses, including labor, if not controlled, would in the near future exceed its income. In order to remain economically viable and to survive into the 21st Century, the hospital felt compelled to reject the union's economic demands.

The hospital was keenly aware that in the past 10 years more than 500 community hospitals, according to a U.S. Congressional commission, have either been closed or converted to nonacute care facilities. Canonsburg needed to take the necessary steps, however difficult, to prevent itself from becoming another statistic.

Offers and Counteroffers

The then existing contract between Canonsburg and District 1199P expired on February 28, 1991. At the expiration of the old contract, the parties continued to bargain, with a subsequent work stoppage of one day on March 12, 1991, and a work stoppage of two days on March 24 and 25, 1991. In order to avoid the two day work stoppage that was to start on March 24, the hospital, on March 22, made a final economic offer which would have increased its total labor cost over a three year period by 8.9%, an amount it felt would reflect the increases it would be receiving over the three year period from Medicare and Medicaid payments. That proposal also asked the employees to share in a portion of the hospital's cost

of providing group medical insurance benefits to the employees and their dependents. Under the old contract, the employer paid the full cost for those expensive benefits.

The union countered with a package that would have increased the hospital's cost over a two year period by 13.3%, an amount more than double what the hospital felt it could recover in increased Medicare/Medicaid payments. On April 4, 146 of the 154 active bargaining unit employees went on strike. At the time, the hospital had approximately 100 patients. No one, at the time, could have predicted that the strike would last 150 days.

After seven weeks, the hospital, on May 23, made a revision to its proposal, increasing its total labor cost by 9.0% over three years. The modified proposal also provided for gain sharing, where employees would receive a share of any operating surplus the hospital might have at the end of each fiscal year.

The proposal also provided a "Home Host Plan," where employees needing medical services would be required to use hospital services, if provided, rather than other health care providers, in order to receive the full reimbursement from the hospital's insurance carrier. Finally, the proposal offered $150 per employee bonus if the union ratified the contract and returned to work within 5 days (an amount the employees never did recapture in the subsequent arbitration award).

Permanent Replacements, Picket Line Behavior

When the strike began, the hospital was concerned about its ability to continue to provide its patients with high quality health care without any disruption in service. Two short-term solutions were found. First, management and nursing staff increased their responsibilities and went onto 12-hour, 6-day-a-week work schedules. Second, about 45 temporary replacements were hired.

These solutions worked at first, but after eight weeks certain positions remained unfilled, and the hospital was concerned that its managers and nursing employees were beginning to "burn out" because of the long hours (i.e. 72 hours per week, week in and week out). To complicate matters, pressure was building on the hospital to allow its employees who continued to work to have vacation time off with their families. The hospital felt it could not postpone vacations indefinitely.

To continue to provide quality services, the hospital reluctantly considered hiring permanent replacement workers, especially in critically skilled positions such as Certified Nursing Assistants, Medical Transcriptionists and Coders. The only way the hospital could successfully recruit qualified personnel in these categories was to entice them to leave permanent positions elsewhere by offering them permanent employment. The decision was a sensitive and difficult one to make. The hospital agonized over the question, and postponed it a number of times even though they knew it was the only decision they could make to continue providing quality health care.

Predictably, the announcement caused a public outcry. District 1199P accused the hospital of trying to break the union. Media coverage, both print and broadcast, heightened considerably. One immediate result was that 13 strikers crossed the picket lines, joining 13 others who had earlier returned to work. Because the hospital realized that there was potential for adversarial relationships between those employees and the strikers when they ultimately returned, the hospital proposed that the replacements and the employees who crossed the picket line to return to work would not be required to join the union at the end of the strike.

In the months that followed, more than 200 workers and demonstrators were arrested for violating court orders limiting the number of pickets at the hospital entrances and prohibiting the blocking of the entrances. During one mass rally, nearly 700 union supporters rallied at the hospital. Judge Thomas Gladden, President Judge of the Court of Common Pleas of Washington County, found the union and its leaders, including the president of District 1199P, in contempt of court on two separate occasions and imposed two separate civil fines of $10,000 each. In addition, he ordered the union to post a $25,000 bond to cover any damage suffered by the hospital from the union's misconduct. In early June, at the request of both the hospital and the union, Judge Gladden attempted--unsuccessfully--to mediate a settlement. Because of pressure he exerted, the union on June 5, modified its proposal, calling for a 12.3% increase in wages and benefits over a three year period. The union's proposal did not provide for the employees to share any of the cost of the group medical insurance program.

In June, the union received an unexpected boost when the state awarded unemployment compensation benefits to the strikers, based on the theory that the strikers were allegedly fired when permanent replacements were hired. That issue is pending on appeal before the Commonwealth Court of Pennsylvania. Tomorrow I will be arguing that case before the full court (en banc) in Harrisburg, Pennsylvania. The Pennsylvania Chamber of Commerce, the Hospital Association of Pennsylvania and the Hospital Council of Western Pennsylvania have all filed amicus briefs in support of the hospital's position.

The Settlement

By August, both sides were frustrated and groping to find a common ground on which to settle. Toward the end of August, the Chairman of the Washington County Commissioners stepped into the fray and attempted to mediate the dispute. During 48 hours of constant negotiations, he convinced both sides to agree to submit the issue of economics to binding arbitration. In addition, the parties agreed that the striking workers would return to their jobs and that the permanent replacements would be laid off, rather then being discharged as the union had earlier insisted. The parties also agreed to submit to binding arbitration the hospital's decision to discharge two of the striking employees for picket line misconduct. Finally, the hospital agreed to drop its proposal on modifying the union security clause as that related to the permanent replacements and the cross-over employees. On August 30, the strike ended.

The Aftermath The Economic Arbitration

The parties selected Arthur Porter, a labor economist and arbitrator from Ohio, to act as the neutral arbitrator to resolve their economic differences.

In February 1992, after five days of hearings, he handed down his decision, which was virtually identical to the hospital's final offer, awarding wage and benefit increases of 9.1 percent over three years. Arbitrator Porter, recognizing the serious problems acute care hospitals face in attempting to financially survive today, said at page 7 of this award:

> A small community hospital such as Canonsburg is caught between the feelings of employees that their real, earned hourly incomes are eroding and the pressures on a medical/ hospital establishment, in which 70% of its income is dependent on Medicare/Medicaid payments. Unless Canonsburg Hospital can move toward a reduction in the Medicare mix within its patient population, the Hospital will become increasingly dependent upon forces outside its control. The general population mix of the region is working against much changes in the patient mix, since Western Pennsylvania is an area with a high percentage of persons in the over 65 age group.
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> Finally, there is little financial relief in prospect for small general hospitals, such as Canonsburg General. The gap between costs and payments is slated to widen under Medicare. Medicaid is likely to remain stagnant or decrease as to payments. Blue Cross has been quoted as moving toward a fixed payment system. Many business organizations are taking steps to develop so called managed care systems. Under such arrangements, the business or its representatives contract with specific providers, such as physicians and hospitals to give care for fees that are less than those paid by the "general public". It may be that the Canonsburg Hospital will become such a managed provider for one or more companies in its area. Such a development might provide some "temporary" relief to the budget pressures. (Emphasis in original.)

Under his award, employees are now, for the first time, paying for a portion of their group insurance benefits, as well as participating in the hospital's "Home Host Plan." The decision was almost identical to the hospital's May 23 proposal, which amounted to a three-year increase of 9%. Judge Gladden had in early June suggested to the union that they adopt the hospital's May 23 proposal. In fact, Arbitrator Porter's award was very close to the proposal that the hospital made on March 22, some 13 days before the strike started.

Conclusion

I think all of us would agree that, absent putting its patients out on the street, Canonsburg General Hospital had no other alternative than to hire permanent replacements. I also believe all of us would agree that no such bill as H.R. 5 should be adopted that would force hospitals like Canonsburg to either shut down or, in the alternative, agree to exorbitant, inflationary demands. In my opinion, had the hospital not used permanent replacements, the strike would have lasted longer and the final settlement would have been much more costly.

As an experienced negotiator, I have serious concerns about the effect H.R. 5 will have on our economy if adopted. I am convinced that if fair minded employers who are faced with unreasonable demands from a union cannot, if pushed to the wall, even consider hiring permanent replacements, many businesses will be faced with a Hobson's choice of either throwing in the towel, or agreeing to the union's demands and ultimately being forced out of business because of an inability to compete in the market place. Either choice will have devastating effects on the employees (both the striking and the nonstriking employees), their

families, the owners (many of whom have their entire life savings in their business), and the community in which they live. All will be losers.

I thank you for the invitation to appear before you today and welcome any questions you may have.

Chairman WILLIAMS. Thank you. My thanks to both of you.

Mr. Nash, we have heard for several years now from witnesses who are opposed to this legislation, or its earlier counterpart, that 1938 is a magic year when a delicate balance was established between labor and management and we should preserve that balance. You have spoken about an appropriate balance as well. Although, I don't believe you think it goes back magically to 1938, perhaps you do.

Mr. NASH. I think 1935, but go ahead.

Chairman WILLIAMS. Nineteen-thirty-five. In the years after 1935, unions could engage in secondary boycotts; they could require union membership; they could absolutely enforce strike-line discipline on their members. Those things have been taken away. Did that injure that delicate balance with which we must not tinker, or can we make some changes here and there without destroying the appropriate balance between labor and management?

Mr. NASH. Well, number one, the secondary boycott problems were determined by Congress in 1947 to be inappropriate, and in 1947 the Taft-Hartley Act was passed. There was no argument, that I know about, from 1947 until about 1981 that the balance at the bargaining table had been inappropriately tampered with. Basically, what secondary boycott prohibitions did was relieve third parties who had nothing involved in the bargaining from the inappropriate pressures of the union and had little, if any, impact on bargaining. I can't remember the second example that you gave.

Chairman WILLIAMS. You, of course, get the drift of the point.

Mr. NASH. Sure.

Chairman WILLIAMS. That is, that Congress isn't trying to unnecessarily disrupt a delicate balance. I just think that the definition of delicate balance is in the eye of the definer. We are trying to preserve a delicate balance and be sure that the scales are appropriately weighted on each side.

Our first witness today has written and spoken a great deal about international competitiveness, and, as you know, has established a new commission which he is hopeful, in part, will do work that will enhance America's international competitiveness.

I believe that every industrialized nation with the exception of two, Great Britain and the United States, have statutes which disallow the permanent replacement of striking workers. Yet, those nations tend to enjoy more stable and successful labor relations, certainly, than does Great Britain and, in some years, have had greater stability than the United States. What can we assume from that?

Mr. NASH. I think it's a mistake to take one little piece of a labor law out of the whole fabric of the labor laws in other countries and suggest that that would work here. In other countries, such as Germany and France, there are some restrictions on strikes, on striking generally, that do not exist here. I believe it's France or maybe the Netherlands that has a restriction altogether on a strike that might inappropriately hurt or destroy a business.

There is a significant history within those countries of labor-management cooperation of union individuals being on boards of directors, not the kind of history we have here. To take that one

single example out of the context of those laws and try to transport it to our laws, I think is a mistake.

Let me suggest that competitiveness in this country is, I believe, in danger if H.R. 5 is enacted. It puts all of the power in a strike situation in favor of the union in seeking demands which are anti-competitive, and I believe puts the employer in a position where he either agrees to those anticompetitive demands and then becomes noncompetitive and goes out of business, or ultimately goes out of business as a consequence of the strike.

Furthermore, and just as an aside based upon the Secretary's comments today, I don't see how H.R. 5 has anything but a negative impact, if any impact at all, on labor-management cooperation. If, in fact, there is labor-management cooperation in a particular company or a particular industry, then they are cooperating, and there are not strikes and there are not replacements.

On the other hand, my experience at the bargaining table in my 25 to 30 years experience in the labor business indicates that part of what produces cooperation on both sides is that the alternative is so very much worse than cooperation. The alternative for an employer is the possibility of a strike that will ruin its business; the alternative for employees is the possibility of the strike in which they may be replaced.

The old saying, to get a donkey's attention, you hit him in the head with a board, applies. Human beings tend to cooperate more fully, particularly in an emotion-charged area like labor-management relations when the consequences of not cooperating are worse.

Chairman WILLIAMS. Let me ask you about that point, with regard to that balance, because that's what we are trying to achieve here.

Mr. NASH. Sure.

Chairman WILLIAMS. I think we are all on the same side; we have different means to get to the same ends. I don't know if you were in the room when I mentioned that I both owned businesses and worked for union and nonunion businesses.

Mr. NASH. Yes.

Chairman WILLIAMS. When I owned a business, if I knew that a strike was, in fact, going to ruin my business, that would have weighted it toward labor, no question. By the same token, if labor knew that when they struck they were out of a job and my business opened the next day, that weighted it toward me. I don't think there is any question about that. I think to see it otherwise is to paraphrase a term you used, "nuts."

Mr. NASH. I think you quoted, not paraphrased; but yes, I used that term.

[Laughter.]

Chairman WILLIAMS. I'm quoting it in a different context, which I think is a paraphrase.

Mr. NASH. All right.

Chairman WILLIAMS. Yes. I don't understand it. I mean, what power does a worker have in the ultimate, which is what you were referring to in your last answer? If they know they are going to lose their job and the business will continue as usual, what power does a worker have?

Mr. NASH. Then they have the power to agree through persuasion at the bargaining table, which is what the National Labor Relations Act——

Chairman WILLIAMS. So you take away the bullet from the gun, though. Ultimate power, we're talking about.

Mr. NASH. Well, that depends upon the particular industry and the particular plant, and the particular circumstances. But the National Labor Relations Act was not enacted to equalize in every single industry and in every single situation the economic powers on the two sides. What it did was say, "Labor, you have the right and the power to strike if it is going to be valuable to you, and you can use that to try to get an agreement.

"Management, you have the right to continue to function and run your business, which includes hiring permanent replacements, if that can be of value to you."

In individual circumstances, labor may have more power or management may have more power, but the Congress, in my judgment, in 1935 did not try to legislate that the economic power in every place has to be the same. That was going to be depend upon the circumstances. It just gave weapons to each side, and those will fall where they do.

Chairman WILLIAMS. Thank you.

Mrs. Roukema.

Mrs. ROUKEMA. Well, we seem to be going over the same material here. I do want to thank you both, because I think you have been very valuable members of this discussion here and have given valuable testimony.

Mr. O'Connor, I appreciate the fact that you have held up a real life example to us, especially in a service such as a hospital. Obviously, you were facing the fact of shutdown, if not bankruptcy; but in any case, the patients were going to be removed. That is correct?

Mr. O'CONNOR. It affected patient care, and the problem was how do you get temporary employees in critical care.

Mrs. ROUKEMA. No. It's very graphic description, and of course the same economic forces are at play in other types of businesses, but when it applies to a hospital it shows the real need for somehow trying to come to accommodation or at least giving you some kind of ability to not strike back, I hate the confrontational aspect of it, but at least——

Mr. O'CONNOR. To survive.

Mrs. ROUKEMA. [continuing] to survive. That's much better, a much better word.

Mr. O'CONNOR. The survival of the hospital.

Mrs. ROUKEMA. Let me ask, Mr. Nash—and if Mr. O'Connor wants to add his opinion to this—let me ask you, Mr. Nash, and it really follows up very nicely on the point that you left off with in the Chairman's testimony. If you have listened to my questions here and my introduction to Secretary Reich, you know I am interested in reforming the processes before the National Labor Relations Board. It seems to me that that's one avenue for reform here or for maintaining equity.

Based on your experience, and it is obvious that you have considerable experience, do you think that the protections and the remedies that you have outlined, I believe in your testimony, seem only

ineffective because of the long delays before the National Labor Relations Board; and if so, to what extent do you think we can reform that; or should it go before the Commission that Secretary Reich has discussed, and as I have recommended, that that be included in the Commission's deliberations?

It seems to me, and you might disagree with me, but it seems to me that we can't defend the National Labor Relations Board delays and pretend that they are giving the equity needed here or expediting procedures, or rather the consequence of their delay in procedures is resulting in essentially depriving both unions and management of an economic remedy here. Am I wrong on that, based on your experience? How would you respond?

Mr. NASH. I'm of several minds on that.

Mrs. ROUKEMA. Aren't we all, aren't we all.

Mr. NASH. First of all, I am and always have been a great defender of the NLRB. I think it's the single most efficient agency in this Federal Government. Certainly, there are horror stories and situations in which individual cases do not move rapidly enough, but that will happen no matter what you do or what system you put in place. There may, in fact, be good and legitimate reasons to call for expedited decisions by the NLRB in certain situations, such as in a striker replacement situation putting time limits on, that might be helpful.

The NLRB is required under law to expedite the consideration of secondary boycott cases. If there are other cases that the Congress thinks ought to be legislatively expedited, or expedited by legislation, that certainly is an area that one can look to.

One of my other minds tells me, however, that NLRB delays aren't always bad. An investigation——

Mrs. ROUKEMA. Two years?

Mr. NASH. Pardon me?

Mrs. ROUKEMA. Two-year delays?

Mr. NASH. Well, I was just involved in settling a 20-month strike, which if the NLRB had acted more quickly would never have been settled. The mere pressure or the possibility of a decision one way or the other in that case ultimately produced a settlement. Had the Board——

Mrs. ROUKEMA. Were the permanent replacement workers used in that circumstance?

Mr. NASH. Permanent replacement workers in that setting. That's why I'm kind of another mind on it. There are instances in which the Board's delays can put pressure on the parties to come to an agreement that they ought to come to, in any event. The mere pendency of litigation before the NLRB, no matter which way it falls, can put significant pressure on labor and management to resolve their problems at the bargaining table, where they ought to be resolved.

On the other hand, because there are horror stories and cases that delay and go on and on, some kind of legislated time targets or legislated expedition in certain kinds of instances such as strike replacement, may very well be something that we ought to look at. That's the kind of thing, it seems to me, that the Commission ought to be looking at. Because when you're talking about telling the Board to expedite, you may be talking about expediting not

only in that area, but in other areas. So much of the labor law depends upon—one part depends upon another part. But that's the kind of a thing that a commission ought to be looking at, it seems to me.

Mrs. ROUKEMA. Thank you.

Mr. NASH. I'm kind of several minds on that, on that issue. Overall, I think the NLRB is an extraordinarily efficient agency. It handles cases with great dispatch, with the exception of some horror stories. I know it is popular to say otherwise, but my experience indicates that it is the single most effective agency I've ever seen, and I am proud to defend them.

Mrs. ROUKEMA. Mr. Nash, from your experience, would you like to comment on this?

Mr. O'CONNOR. Mr. O'Connor.

Mrs. ROUKEMA. I'm sorry. I'm sorry, I meant Mr. O'Connor.

Mr. O'CONNOR. I agree with Mr. Nash. How could I disagree with someone with his reputation. Frankly, in the strikes that I have seen and that I have been connected with, frankly, how fast the Labor Board moves is really not a factor, very rarely. It is really very rarely does the Board settle these, and very rarely is the speed of the Board going to result in any change in most of the cases, unless you've got an unfair labor practice strike. If you've got an unfair labor practice strike, that's something entirely different. I would agree that should maybe be on a fast track.

Mrs. ROUKEMA. Well, we're talking now about economics.

Mr. O'CONNOR. I would like to make one comment, if I may. There was reference to Germany. In Dan Yaeger's new publication, "Loading the Scales: Is the Balance Between the Right to Strike and the Right to Operate in Need of Reform," at page 167, he talks about Germany. It's true, there is a limitation on the right to strike there, but also there is a tribunal there that makes the determination whether strikes should continue or not, and they are to balance a number of factors. One of those factors is if the strike can be conducted fairly, and the strike impact cannot be severe enough to grievously wound the company.

Would unions here be willing to put into legislation that they only can strike when they can't grievously wound the company? I don't think so. I give an example, a live example from Pittsburgh. I'm sorry Congressman Klink isn't here, but the Pittsburgh Press Strike of this last year—frankly, the strikes won that strike. They didn't need an H.R. 5 to do that, because public pressure said this isn't the way you conduct yourselves.

Mrs. ROUKEMA. Thank you. Thank you, Mr. O'Connor, Mr. Nash. We will be talking more about this in the very near future, and I hope to be working with you and rely upon your vast experience. Thank you very much.

Mr. BALLENGER. Mr. Chairman.

Chairman WILLIAMS. Mr. Ballenger.

Mr. BALLENGER. One last shot. Out of the same book, I'd like to read, Mr. Nash mentioned the laws in Germany and you did also, and let me just read a list of the laws that if unions in this country were willing to accept, then maybe they wouldn't want H.R. 5 either: "Permitting an individual bargaining or unilateral employee action to supersede collective bargaining agreements." Wouldn't

they love that one? That's in France, Italy, Belgium, and the Netherlands. Or, "Prohibition of a strike where there is no union representation," that's in Germany. He just mentioned prohibition against a strike being severe enough to grievously wound a company, and a prohibition against strikes seeking union recognition.

Everybody wants to say that what they have in Europe and Japan is what we ought to have, but really it's the whole system that you've got to accept. The third one, the last one, is the absolute ineligibility of strikers for unemployment benefits, and that's in all of Europe and the Scandinavian countries. Now, if we could have all of these thrown in with H.R. 5, do you think you could get any votes here from the labor side of this whole issue?

I would like to ask, Mr. Nash, one thing. In the hospital case, they used binding arbitration. I don't know how you feel about binding arbitration, but could you venture your interpretation? Because that has come up in the Senate bill last time, the idea of forcing binding arbitration.

Mr. NASH. Yes. I am not a proponent of interest arbitration which resolves collective bargaining disputes; I am a proponent of grievance arbitration in collective bargaining agreements. The kind of arbitration you're talking about is settling the parties disputes and ultimately writing an agreement for them.

My experience indicates that that interferes substantially with bargaining, and what ultimately happens is that the parties through their bargaining across the table posture themselves for an ultimate arbitration, figuring the arbitrator is going to split the difference someplace. It is very, very difficult to motivate the parties to come to an agreement when you're posturing to ultimately litigate. So overall, I am not a proponent of interest arbitration.

Mr. BALLENGER. Right.

Mrs. ROUKEMA. Would the gentleman yield?

Mr. BALLENGER. Sure.

Mrs. ROUKEMA. May I ask a question, following up on that because it's a very important point? However, you do agree that in the case of the Pittston Coal Strike, Secretary Dole's actions with respect to arbitration were well-advised?

Mr. NASH. I think that was mediation, wasn't it? I think they brought in a former Secretary to mediate the dispute.

Mrs. ROUKEMA. Usary, Mr. Usary.

Mr. NASH. That's when you are bargaining, both parties are bargaining and he is shuttling back and forth between the two, bringing them together.

Mrs. ROUKEMA. All right. It was mediation?

Mr. NASH. Yes. But mediation, I think, is extraordinarily helpful, and there is no better mediator than Bill Usary.

Mrs. ROUKEMA. I thought it was arbitration. I stand corrected. Thank you.

Mr. BALLENGER. And just one more statement. Mr. Chairman, you mentioned about the union member automatically knowing he is going to lose the job. But in the particular case of the hospital, that we just heard, you had the choice of the company settling with the union and destroying themselves or holding out on the strike.

I think that Mr. Nash's statement that each case has its own individual rules and regulations—I just have found, having been in

Congress now for 6 years, that almost anything that goes on in our country today if regulated by the Federal Government, it will be screwed up completely. That's a completely biased statement.

Thank you very much.

Chairman WILLIAMS. We have come close now to concluding our hearing and the testimony of our final two witnesses just on time, as the members can tell from the ringing of the bells. I would like to note for my colleagues' benefit, that in my discussion over the years with leaders of organized labor, including not very long ago President Kirkland, I discovered, initially to my surprise, that labor's leaders in the United States would, for the most part, make a wholesale trade of our labor laws for the labor laws of other countries. No questions asked, an even trade.

One can look at the membership rates in other industrialized countries which have organized workforces of between 25 to perhaps as high as 80 percent of the population in the private and public sector organized, and compare that with America's rate of 11 percent in the private sector, 15 percent or perhaps 16, overall.

Lane Kirkland said to me at lunch one day, that the President of the AFL-CIO can no longer go abroad and tell other countries how to structure their laws to protect the rights of their workers. They now come to us and tell us how to do it. If America is going to lead in the new world order, we might first join it.

Mr. BALLENGER. Well, obviously Mr. Kirkland's not doing too well, so I would say that if I were him and I was going down the tubes, I would look for some way out myself.

Chairman WILLIAMS. Well, I just don't believe that Mr. Kirkland or the vast members of this committee or this House and probably in the Senate as well believe that those changes require a diminution in the rights of workers to organize, bargain collectively, and have their jobs protected in the event of a strike.

Again, we appreciate both of your good counsel and advice here today. This hearing is adjourned.

[Whereupon, at 1:10 p.m., the subcommittee was adjourned subject to the call of the Chair.]

[Additional material submitted for the record follows:]

Statement of

The Associated General Contractors of America

Presented to the
Education and Labor Subcommittee
on Labor-Management Relations
of the
United States House of Representatives
on
H.R. 5, Regarding Striker Replacement
March 30, 1993

The Associated General Contractors of America (AGC) is a national trade association of more than 32,000 firms, including 8,000 of America's leading general contracting firms. They are engaged in the construction of the nation's commercial buildings, shopping centers, factories, warehouses, highways, bridges, tunnels, airports, water works facilities, waste treatment facilities, dams, water conservation projects, defense facilities, multi-family housing projects and site preparation/utilities installation for housing development.

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The Associated General Contractors of America (AGC) is a national trade association of more than 32,000 firms, including 8,000 of America's leading general contracting firms, many of which operate with collective bargaining agreements, and many of which operate on an open-shop basis. They are engaged in the construction of the nation's commercial buildings, shopping centers, factories, warehouses, highways, bridges, tunnels, airports, water works facilities, waste treatment facilities, dams, water conservation projects, defense facilities, multi-family housing projects and site preparation/utilities installation for housing development.

AGC appreciates the opportunity to provide this statement to the House Education and Labor Subcommittee on Labor-Management Relations on the issue of maintaining company operations during an economic strike. AGC requests that this statement be made a part of the record of the Subcommittee's proceedings.

The legislation under consideration, H.R. 5, would impair a business's ability to attempt to continue operations during a strike by amending Section 8(a) of the National Labor Relations Act to make it an unfair labor practice for an employer to hire permanent replacement workers during a strike, or to grant an employment preference to those who worked, or offered to work, during a strike.

AGC strongly opposes this legislation because: 1) it is unfair; 2) it would promote strikes; and 3) it would seriously impair the development of a high performance domestic economy need to compete globally.

By promoting strikes and impairing an employer's ability to maintain operations during a strike, H.R. 5 would:

- Be a denial of basic freedom for the vast majority of the U.S. workforce.
- Radically alter the delicate balance in labor-management relations which has evolved over many years with respect to economic strikes.
- Force an employer to shut down or sharply curtail operations during a strike.
- Shift bargaining power to unions by forcing employers to accept unreasonable union demands to avoid the severe economic consequences of a shutdown caused by a strike.
- Increase the number and frequency of strikes because union members would be assured of retaining their jobs.
- Remove the rights of individual workers by prohibiting employers from retaining workers who exercise their right to work by freely electing to cross picket lines.
- Endanger the job security of non-striking employees who could lose their jobs or suffer reductions in pay or benefits as a consequence of a strike as layoffs or benefit reductions become necessary.

The National Labor Relations Board (NLRB) and the courts have maintained a careful neutrality in disputes between management and labor since the 1930s. Current federal law provides that employers may attempt to continue operations by hiring replacements for strikers only when there is an economic strike. During lock-outs or unfair labor practice strikes, strikers enjoy the right of full reinstatement. The rights of employers and employees during economic strikes are therefore balanced to ensure fairness.

The leading decision addressing this issue was handed down by the Supreme Court in 1938 in NLRB v. Mackay Radio and Telegraph Co., 302 U.S. 333 (1938). In that case, the Court held that an employer is not required to replace permanent striker replacements, provided that the employer has not violated the National Labor Relations Act (NLRA). This doctrine has been reaffirmed consistently by the NLRB and the courts.

Proponents of this legislation argue that the practice of hiring striker replacements has become widespread, that the balance in collective bargaining has shifted in favor of employers, and that the replacement of striking workers is tantamount to firing employees for exercising their right to strike.

AGC submits that the hiring of striker replacements is not a widespread practice in the construction industry. In fact, operations during a strike often are not feasible because skilled temporary replacement workers are not always readily available. Construction employers who do hire striker replacements do so as a result of economic realities and project completion requirements, which are always made part of the contract with the project owner, rather than any alleged strategy to "break" a union. In the construction industry, where failure to meet completion deadlines often carries financial penalties, employers may have no choice but to hire new workers when their employees walk out and refuse to work. The short construction season in many parts of the country also makes it essential that construction employers have the option of continuing to maintain operations during a strike. It is the employer's right to choose to attempt to

maintain operations during the course of an economic strike that this proposed legislation would deny.

In recent years, union membership has declined to little more than 15% of the entire U.S. workforce. This legislative proposal is nothing less than an attempt to abuse legislative power to reverse a three-decade decline in union membership. This proposal mandates results that unions have been unable to achieve through the collective bargaining process. It runs counter to the principle of allowing employee free choice and unbiased labor market economic decisions.

AGC also believes that the proposed legislation introduces an unfair element into the existing balance of labor-management relations. An employer's right to operate during a strike by hiring striker replacements is one of the few mechanisms available to maintain an incentive for unions to resolve labor disputes. Without this essential option, unions would be granted controlling economic power, detrimental to even businesses and workers who are not affiliated with unions - as the economic dislocation caused by increased strike activity will have ripple effects throughout the economy.

Under current law, unions are frequently in a position to sustain an economic strike longer than an employer. This is particularly true in the construction industry, where project completion deadlines often carry financial penalties for the employer. If a union has no incentive to settle a labor dispute because its members' jobs are legislatively protected, but the employer and other employees are in severe jeopardy of

financial penalties or job loss, a construction contractor will have no choice but to accede to the union's demands.

The proposed legislation is a "poison pill" for construction contractors who work without collective bargaining agreements and for the millions of workers they employ. By use of the term "labor dispute," the legislation could encompass any workplace dispute between a group of employees and management. A small group of employees could walk off the job with impunity to protest a new work schedule or the assignment of a new foreman to a crew. The construction contractor would be powerless to replace those employees - no matter how trivial the dispute.

In addition, any time such "strikers" should decide to return to work, they would have to be reinstated, and their replacements would have to be fired. This represents an unwarranted restriction on a construction contractor's right and ability to manage its workforce. Moreover, the unfairness would be visited on workers as well, as the measure would result in the firing of workers who had exercised their right to work through a strike.

This ill-conceived grab for coercive economic power would facilitate the "salting" of an employer's workforce with union organizers. This would put employers in the absurd position of having to rehire the very people who jeopardized the business and the economic security of those employees who want to continue to work through an economic strike.

AGC strongly opposes legislation prohibiting the hiring of striker replacements in the context of an economic strike. Current law adequately and fairly protects strikers in situations where their positions may be jeopardized by unfair labor practices. H.R. 5 would fundamentally alter the carefully crafted balance between labor and management which is essential to effective and fair collective bargaining - and economic balance in labor markets. AGC urges Congress to firmly reject H.R. 5.

Far from even considering striker replacement proposals, Congress should instead enact badly needed legislation to amend the Hobbs Act and thereby overrule the Enmons decision. This action would make organized jobsite violence, which too frequently occurs during labor disputes, a violation of federal law. Collective bargaining decisions - by employers, unions, and workers - should be made on the basis of economic judgments - not fear and intimidation. AGC urges Congress to amend the Hobbs Act and thus protect workers and employers from violence or threats of violence and restore economic balance to labor markets.

STATEMENT OF

S. JACKSON FARIS

PRESIDENT OF THE

NATIONAL FEDERATION OF INDEPENDENT BUSINESS

Subject: H.R. 5, Striker Replacement Legislation

Before: Education and Labor Subcommittee on Labor Standards

Date: March, 30 1993

The National Federation of Independent Business (NFIB) is a small business advocacy organization made up of more than 600,000 small and independent business owners nationwide. Our membership parallels the national business population in that approximately 50% of our members own retail and service enterprises; 25% are in manufacturing and construction; and the remaining 25% operate agricultural, transportation, mining, wholesale, financial, insurance or real estate enterprises. Our membership employs 7 million people and reports an annual gross sales of approximately $747 billion. The typical NFIB member has 8 employees and grosses about $250,000 in annual sales.

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NFIB members have consistently opposed labor law reform over the years, and our membership specifically opposes any attempt to curtail the right of an employer to permanently replace a striking worker. In fact, in a recent survey, 81% of NFIB members opposed enacting striker replacement legislation. NFIB, the nation's largest small business advocacy group, wants to express the concerns of small business owners regarding H.R. 5 and to confirm our opposition to the bill.

When Congress enacted the National Labor Relations Act (NLRA), its intent was to establish a balance between labor and management. H.R. 5 would dismantle this delicate balance which has been in effect for over 55 years.

Under the NLRA, employees are allowed to strike over economic differences. At the same time, employers have a right to operate their businesses during a strike by hiring replacements. The right of the employer to hire permanent replacements was confirmed in 1938 by the Supreme Court in the MacKay decision, and this right has subsequently been reaffirmed several times by the Court.

In a strike, each side has an inherent risk. Strikers risk being permanently replaced, while the employer risks losing the business if it cannot successfully operate through a strike. These relatively equal risks were intended by Congress to balance the bargaining process so that no one side had the advantage. If H.R. 5 is enacted, it would provide unions with a risk-free bargaining tool and would allow them to hold businesses hostage until union demands are met. It would be destructive to many businesses, to jobs and to the productivity of our country.

In recent years, attempts have been made to insulate small business from the adverse affects of H.R. 5. These efforts have failed because the bill poses not only a direct, but also an indirect threat to smaller businesses.

Direct Effects

Small businesses are labor-intensive. If several key employees walk off the job and cannot be permanently replaced, the business' ability to survive could be seriously jeopardized. Often in a small business every employee is a key employee. Take for instance a small plumbing contractor with 10 employees, eight of whom are plumbers. Five employees, all plumbers, walk off the job in protest over wages. Under H.R. 5 these plumbers are guaranteed their jobs back whenever they choose to return. The owner, in the meantime, is left without 50% of his work force and two-thirds of his key employees.

H.R. 5 would allow the owner of this plumbing firm to hire temporary replacements and to substitute management personnel for the jobs left open. However, in a small business setting, neither option is feasible. In most cases, the employer is the management, the accountant, the benefits specialist and the trouble shooter. The owner of the firm could not continue to fulfill all these duties and cover the job demands of the five plumbers who walked off the job. Temporaries would be extremely difficult to find. Where would a plumbing contractor find five experienced plumbers to fill the five vacant positions for an indefinite (perhaps only two weeks) period of time? This is even more problematic in rural areas.

Some have stated that temporary replacements are easily accessible to most firms. This is not the case. Unlike larger companies, small businesses do not normally use temporary placement services because of the cost. Instead, they find employees by placing a "help wanted" sign in the window or by word of mouth.

NFIB represents many family owned businesses. Frequently, small business owners view their workforce as part of the family. They are proud of the cooperative relationship they have with their employees because they know how vital each is to the viability of their business. Small businesses are a model of cooperation in today's work environment.

Labor Secretary Robert Reich has stated many times that the labor-management climate should be more cooperative. NFIB members feel that it is cooperative, but if this legislation is enacted the work place will become more confrontational and disruptive because the number of strikes in both large and small firms will increase dramatically. In this regard, H.R. 5 seems to be the antithesis of what the Administration is trying to accomplish. To reiterate -- if H.R. 5 is enacted, it will erode the present attitude of cooperation that now exists in the small business work place and move us toward a more confrontational one.

Clearly, H.R. 5 poses serious practical problems for small businesses. However, of perhaps deepest concern to NFIB members is that H.R. 5 appears to be primarily a union organizing tool. The bill would set up two classes of workers -- those who are protected during strikes (union member or those in a union certification process) and those who are non-union and, therefore, not protected in strikes. Many of these non-union employees are employed by small business owners.

In setting up two classes of workers, H.R. 5 clearly attempts to promote union membership and union organization. It explicitly gives union members economic and legal advantages denied to non-union employees. It would create a situation in which unions could guarantee the jobs of workers if they join the union, and it would arguably put a ceiling over the career opportunities of any worker who remained on the job or returned to the job during a strike. Such lopsided legislation is a direct threat to non-union business owners who believe unions already have too much power. Simply put, Congress should not be in the business of creating or enhancing union organizing tools.

It is evident by recent statistics that union membership is declining rapidly. In addition, a recent Time/CNN poll found that 73% of the American people believe that unions have too much or just the right amount of power. Despite this, Secretary Reich has publicly stated that he is "deeply committed to reversing the trend" of union decline. While H.R. 5 is likely to help slow union decline, small business owners feel H.R. 5 is inappropriate and unnecessary. Unions only represent a small percentage (11.5%) of the private work force. But keep in mind, this legislation will have an adverse impact on the entire work force.

By creating a setting that favors confrontation, the practical effect of H.R. 5 is more strikes, diminished competitiveness and lost productivity. This has been exhibited in Canada, where a law similar to H.R. 5 exists.

Indirect Effects

No strike takes place in a vacuum. It has repercussions on those employees who choose not to strike, the customers of the struck company, the small businesses that contract out their services to a struck company, and most importantly small businesses in the immediate vicinity of the struck company. Take for instance a restaurant or gasoline station which caters to a plant's workers. A short strike would hurt business; a long one would destroy it and the jobs created. The restaurant would not have the customers it once had, so it would have no other choice but to scale back its workforce by laying off employees. Eventually it would not have the revenue coming in to keep up with overhead costs, leading it to bankruptcy.

The small business contractor is also indirectly impacted by a large company being struck in what is referred to as the "ripple effect." Let's use the example of a plumbing contractor again. The firm has a $1 million contract with a local builder to do all the plumbing work on a new construction project. Knowing that a contract of this size would tax the firm's resources, the plumbing contractor has turned down other projects until this job can be finished.

The electrical union representing the electricians working on the same construction project strikes for higher wages. Further construction cannot take place until the electrical work is complete. As a practical matter this leaves the construction at a standstill. While under current labor laws other construction trades may report to work under the "reserved gate doctrine," shutting down one craft at a critical stage in the project may have the effect of disrupting the entire project.

Meanwhile, our plumbing contractor has purchased the supplies needed to complete the job. All pending work has been rescheduled and no bids have been offered on other work. In a strike, the plumbing contractor then remains idle, not knowing when the strike may end and fearing to commit to new obligations that may cause the firm to be spread too thin.

The bills for the surcharged supplies come due. Cash reserves are depleted to pay the bills. The owner can only hope that the strike will not last long. If it does, plumbers will have to be released because they cannot remain on the payroll with no revenue coming in. Without work and without plumbers, the small business defaults on its obligations. Ultimately, if the strike is of any real duration, the plumbing contractor faces possible closure and bankruptcy.

These are but a few examples of the ripple effect on small businesses if H.R. 5 is enacted. The most troubling aspect of the ripple effect of H.R. 5 is that small businesses have no say in triggering the strike and have no ability to affect its outcome. The small business owner is at the mercy of the unions and the company. The ripple effect of H.R. 5 is a practical, real life problem for small business owners.

Some have tried to argue that small business concerns about the ripple effect are unfounded. However, it is very real outside the beltway. Small business owners across the country feel that if striker replacement legislation is enacted it will have devastating consequences.

Some have suggested a moratorium on hiring striker replacements as an alternative or compromise, meaning that permanent replacements could not be hired for a certain number of weeks. Such a moratorium could be economic suicide for small businesses. It would affect them disproportionately because most do not have the resources to sit out a strike, to transfer work to another location, to substitute managerial and supervisory personnel for striking employees or to recruit temporary replacements. It would also assure that the length of the strike would be guaranteed to last for the duration of the moratorium. Not only would the small business productivity be disrupted, it would be unable to compete equally with larger competitors who can weather the effects of a strike. If a small business is, in effect, shut down for a moratorium during an economic strike, it most likely will never recover.

Conclusion

Small business owners believe H.R. 5 can only be characterized as a classic example of legislation that is a solution in search of a problem. NFIB does not see any way to reach an accommodation that provides striker replacement protection to some and not to all. And since our over 600,000 members oppose striker replacement legislation, so must we.

Recently, an editorial headline in the Wall Street Journal characterized the passage of the family and medical leave bill as "Job Destruction Bill Number One." If H.R. 5 passes the headline would read "Striker Replacement: Job Destruction Bill Number Two."

SOCIAL POLICY RESEARCH ASSOCIATES

Response to Written Questions from Subcommittee on Labor-Management Relations

1. *From your research and knowledge of the literature, is there any connection between the timing of the response to a dislocation and the result of the intervention from the perspective of duration of unemployment, placement wage and post program results and reemployment?*

Several findings from our study support the connection between early intervention and the achievement of better outcomes for dislocated workers. First, dislocated workers enrolled in substate areas that provide comprehensive prelayoff services had higher postprogram wage rates than those enrolled in programs not providing prelayoff services. Second, workers enrolled in programs providing services to help them cope with the crisis of being laid off were more likely to be employed after leaving the program.

Third, although the direction of causation in ambiguous, substate areas with less responsive early intervention services enrolled more clients who were unemployed 15 or more weeks. Probably because of their more immediate need for income, these longer term unemployed workers were more likely to receive OJT, which results in higher employment rates but significantly lower wage rates at placement and at postprogram follow-up.

2. *If early intervention improves worker transition prospects, what should be done to provide more flexibility for local programs to address the potential dislocations before layoffs occur? Is what the Congress did last year in the defense diversification amendments sufficient? On page 26 and 27, you recommend revising the legislation "to recognize a strong substate role in rapid response." Given that only 5% of EDWAA funds were spent on rapid response, do you recommend shifting the responsibility to the substate level?*

The allowable activities in the rapid response category currently do not include any client services. Typically rapid response activities consist of contacting employers and holding worker orientation meetings. The key to early intervention, therefore, is linking rapid response activities to the early delivery of client services.

The legislated division of responsibilities has partially contributed to a discontinuity between rapid response and the delivery of services. In many cases, substate areas saw their role as operating ongoing programs and the state's role as

providing rapid response activities. That common view left unassigned the task of providing early intervention services.

To strengthen the linkages between rapid response and early delivery of services, we make two recommendations. First, we recommend broadening the allowable activities under rapid response to include client services such as prelayoff group workshops. This would encourage the design of a more cohesive set of early intervention activities and services.

Second, we recommend greater flexibility in the substate areas' roles in rapid response. In particular, many substate areas with experience in responding to dislocations are well qualified to conduct rapid response by themselves. If these substate areas were given full responsibility for conducting rapid response as well as ongoing services, it would likely strengthen the connection between these two activities.

Some substate areas, however, have had little experience in responding to dislocations and could benefit from state assistance in rapid response should a large dislocation occur in their area. Thus, we do not recommend that all substate areas be given full responsibility for rapid response, only that the legislation allow delegation of this responsibility to substate areas when appropriate.

The 1992 defense diversification amendments indicated that states could not transfer the responsibility for the rapid response assistance functions to another entity but could contract with another entity to perform rapid response assistance. This provision allows states to contract with experienced substate areas to conduct rapid response and thus allows greater flexibility in state and substate roles. Preliminary analysis of the site visit findings for PY 92, however, indicated some substate areas experienced delays in contracting for rapid response. We will complete the analysis of these case studies in August and at that time will be better able to assess whether these new provisions are sufficient.

3. *On pages 12 and 26, you allude to the need to review the formula for allocating dislocated worker training funds both to the states and substate areas. What are your suggestions for new data bases and what is their availability?*

Many states used the Bureau of Labor Statistics' Mass Layoff Statistics data base to measure the amount of current dislocation in their substate areas. This data base

includes firms with 50 or more initial UI claims over a consecutive 3 week period which, when contacted by telephone, indicated the layoff was permanent. Funding for this data collection effort was recently eliminated, substantially reducing the ability to target EDWAA funds to areas experiencing high levels of current dislocations. Restoring this data collection program and expanding it to all states (three states did not previously participate) is one option to help improve the allotment and allocation of funds.

Another option is to conduct the Displaced Worker Survey supplement to the CPS yearly rather than on the current two-year cycle. This data base yields reliable state-level data that could be used in state allotments. This survey does not, however, yield reliable local-level data on the extent of dislocation so it could not be used for substate allocations.

Some states use the number of WARN notices received as a measure of current dislocation. According to a recent GAO study, however, only about half of large-scale layoffs are covered by WARN and about half of those covered did not file a WARN notice. Because both coverage and compliance are likely to vary across states and across localities, using WARN notices to allocate or allot funds would likely be inequitable.

4. *Do you believe that more money should go to substate areas and that we should reduce the 40% that the states currently keep, or is that balance about right?*

Our study does not indicate that the amount of funds retained by the states should be changed but does indicate that how those funds are used should be changed in some states. The recession highlighted the need for making discretionary funds available to substate areas in need. Even if the allocation formulas adequately targeted funds to areas experiencing high levels of dislocation in the previous year, unanticipated dislocations can occur in any area. States that had committed most of their state funds at the beginning of the year (e.g., for state-wide projects or projects for specific population groups) could not correct imbalances between the need for services and initial funding. We recommend encouraging or requiring states to reserve part of their 40% funds for discretionary grants to substate areas in need, particularly during an economic downturn.

5. *Can you describe the technical assistance received by substate areas from the state or the DOL regional offices?*

Our study did not collect information about regional office technical assistance efforts, and regional office assistance was not commonly mentioned by our case study respondents. We are aware that regional office staff participated in DOL's rapid-response training efforts.

We collected information about state technical assistance efforts through reviewing their state plans and in discussions with state staff. Most states made ad hoc assistance available when substate areas asked about EDWAA issues. Some states, however, were more active in helping their substate areas develop EDWAA programs or services. Such efforts included:

- Workshops on EDWAA topics, such as forming labor-management committees (for example, forming committees in non-union companies), developing financial and nonfinancial coordination agreements with other agencies, and using assessment results in career planning.
- Monthly newsletters on EDWAA issues, including early notice of new regulations or interpretation.
- Technical assistance guides, for example on the role of the neutral chair in labor-management committees, or planning for dislocated worker services.
- Joint planning sessions between substate area staff and staff from ES and other coordinating agencies.
- Assistance in planning for response to specific layoffs, including help in preparing discretionary grant applications, developing appropriate outreach strategies, and coordinating with ongoing state programs.
- Assistance in identifying recently laid off workers (e.g., one state prepares mailing labels for individuals in each substate area who recently file for UI).

States often developed these assistance efforts after conducting surveys of substate areas' technical assistance needs or as a result of common problems found in monitoring activities.

6. *Do we know how training should be designed to maximize the post-program wage levels for participants? Do we need more research? If so, what type of research efforts do you suggest?*

Our research provides some information about program designs that result in higher wage replacements for dislocated workers. Using the criteria of responsive services presented in our written testimony, we rated each substate area's program design. We found that substate areas with more responsive services had significantly higher wage rates at the 13 week follow up, controlling for any differences in participants' previous wage levels, education and other characteristics. (For example, participants in substate areas that scored at the 90th percentile on this measure earned $.40 more per hour than comparable individuals enrolled in substate areas that scored at the 10th percentile.) This finding suggests that providing comprehensive early intervention and basic readjustment services and making a wide range of retraining options available can help dislocated workers replace a higher proportion of their previous wage rates.

More research, however, could substantially increase our knowledge of the types of services that are effective in helping dislocated workers attain higher wage rates. In particular a net impact study of EDWAA, designed to determine the effects of different program components, would be very useful. Even if there are changes in how dislocated worker services are delivered, knowledge about the impact of different types of services and the impact of the availability of needs-related payments on participant outcomes would help programs design better services for dislocated workers.

7. *Should OJT be used as a part of the retraining menu?*

OJT can be a beneficial training service, and we found several examples of OJT positions that provided needed retraining. We also found, however, many cases of unresponsive OJT practices. Some substate areas relied on OJT as the primary or even sole retraining option for dislocated workers, which often resulted in short-term training in low-wage positions. Further, many substate areas paid little attention to whether an OJT position provided training in skills that the participant needed to acquire.

If OJT is retained as a retraining option, it should be used selectively and the contracts should be more explicit about the training to be provided. If a more

individualized service approach is adopted for dislocated workers (as we recommend), it will likely result in a more selective use of OJT. Further, the 1992 JTPA amendments require that the length of OJT be related to the training content and the work experience of participants, which will likely increase the focus on the skills to be provided in OJT. If these changes improve OJT practices, then we would recommend retaining OJT as one option in the retraining menu.

8. Should each participant be assessed?

We would like to distinguish between participants in group-level services and those in individual-level services. Often prelayoff services are provided to a large number of individuals who can benefit from the information provided in group workshops but may not need further EDWAA services. It would not be cost-effective to assess all of these participants.

Assessment should be provided, however, to dislocated workers seeking further services, including both those interested in immediate employment and those interested in retraining. On the basis of well-developed services we found in some sites, we recommend that assessment cover not only interests and abilities but also the transferability of dislocated workers' existing skills to other occupations.

STATEMENT

SUBMITTED BY

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Mr. Chairman and Members of the Subcommittee:

The Society for Human Resource Management (SHRM) is the leading voice of the human resource profession, representing the interests of more than 50,000 professional and student members in 435 chapters from all 50 states. SHRM is strongly opposed to H.R. 5, anti-striker replacement legislation.

Our opinion is that the existing structure of our federal labor law has served and continues to serve the interests of productive collective bargaining. We believe that the proposed legislation will not, as a practical matter, address the evils that it seeks to remedy, and that the potential exists for this legislation to exacerbate labor management conflict and inhibit effective collective bargaining to the detriment of the American worker and American industry.

The economic strike is a protected and complex employee weapon in the collective bargaining arsenal. While the economic strike has a long tradition and has proven to be effective in bringing the parties together, it is not the favored means of achieving agreement. Not labor's favored means, not the government's favored means, and not the employer's favored means. The legal parameters for an employee and employer involved in an economic strike have been developed over the last half century, and have been designed to insure that disputes get resolved without destroying the underlying bargaining structure, what Professor Estreicher, Professor of Law at the New York University School of Law, calls the "bounded conflict" principle. The Mackay replacement rule, first established by the Supreme Court in the case of NLRB v. Mackay Radio & Telegraph Co., 304 U.S. 333, issued in 1938 and refined in a number of important Supreme Court rulings, has been an important part of the mechanism providing for effective and legitimate use of the economic strike. The Society feels that changing the boundaries in the absence of compelling empirically verifiable date, is not warranted. The available data does not justify a change.

If the Supreme Court's decision in Mackay were tilting the balance of power inequitably in the favor of the employer, we would expect either an increase in strike activity, or we would expect to see an increase in collective bargaining agreements which contain an imbalance in the employer's favor. This has not been the case. In 1968, the percentage of workdays lost to strikes was two tenths of one percent. In 1989 the percentage of workdays lost due to strikes was seven hundredths of one percent. According to the Bureau of Labor Statistics the contracts negotiated in the first two quarters of 1990 provided an all-industries first year average wage increase of 4.2 percent and an annual over term increase of 3.8 percent. Major settlements during 2989 netted wage adjustments averaging 4.0 percent in the first year and 3.4 percent annually over the term of the contract. This indicates a considerable improvement over contracts negotiated through the mid 1980's and a healthy

collective bargaining environment for negotiating economic issues. The bottom line is that the structure works--if "it ain't broke don't fix it."

If permitting employers to hire permanent replacements during an economic strike were the employer panacea that it is touted to be, one would expect widespread use. One would expect evidence of the use of permanent replacements during economic strikes to result in the widespread loss of jobs. Neither of these things have occurred.

Permanent replacements during economic strikes were hired in only 17% of all 1989 strikes, according to the General Accounting Office, and a total of 4% of all striking employees were replaced. The report does not indicate how many of that 4% regained positions as a result of a strike settlement, or were hired as appropriate positions became available. The number of persons who actually and permanently lost their jobs as a result of an employer hiring permanent replacements is significantly less than even the GAO figures would indicate. This is not to minimize the trauma to the worker who happens to be the victim of the process, but the process is not causing the type of inequity that calls for federal legislation. On the contrary, the process overall is resulting in the effective negotiation of equitable collective bargaining agreements, and labor peace.

The idea that the law permitting employment of permanent replacements during an economic strike is some kind of management panacea is without merit. Its limited utilization alone suggests that it is not a weapon of first resort. In making judgements on how or whether to continue operations during a strike, management factors into the equation the very real economic costs of replacements, in recruiting, hiring and training. It factors the morale cost, the possible damage to the collective bargaining relationship that will result from the determination to use replacement workers. Current law puts very significant restrictions on the recruitment of replacements and on what management can offer to replacements. Under present law the employer who chooses to use permanent replacements during an economic strike also operates under a heavy obligation to insure full compliance with the provisions of the National Labor Relations Act, and must insure that it takes no steps or engages in no activity which could convert the strike into an unfair labor practice strike. Frankly, employing replacements is not an attractive tool for anything other than to keep the enterprise in operation while the parties put their proposals in the test of a strike. Again quoting Professor Estreicher:

> . . . while the law permits a collectivization of the employees' bargaining position, it does not displace market mechanisms for the pricing of goods and services. The employer's attempt to withstand the strike provides an important market check on union demands. It is where employers are reluctant to

> maintain operations during strikes, as is often true in the public sector, or are unable to resist a strike because of, say, customer reactions, as was historically true of steel, that we tend to have industries in serious trouble.

SHRM respectfully submits that the option of hiring replacements as established some 54 years ago in Mackay, as refined through usage and judicial and Congressional actions to the present have, not had a negative impact on labor-management stability. Rather, the judicious use of this option has served the parties and the general public well.

Finally, SHRM would like to express its concern that this legislation impacts not only the visible tip of the collective bargaining iceberg, the strike, but also the less visible body of the collective bargaining process--negotiations. The economic, political and legal cost of a strike is always part and parcel of the calculus used by both parties at the bargaining table. The proposed legislation would unilaterally withdraw an important management weapon from the employer, tilting the balance of power in a manner not justified by recent collective bargaining practice.

In NLRB v. Insurance Agents Union in 1960, the Supreme Court recognized the delicate balance which exists at the bargaining table and acknowledges that unwarranted tampering could work against the stated objective of this legislation:

> The two factors-necessary for good faith bargaining between parties and the availability of economic pressure devices to make the other party inclined to agree on one's terms -- exist side by side . . . And if the Board could regulate the choice of economic weapons that may be used as part of collective bargaining, it would be in a position to exercise considerable influence upon the substantive terms on which the parties contract.

In summary, SHRM opposes this bill on three grounds. First, the existing collective bargaining climate indicates an acceptable balance between labor and management resulting in equitable contracts and relative labor peace. Any change in the structure in the absence of compelling need is unwarranted. Second, the present law allowing for Mackay replacements is not utilized in economic strikes to such an extent that it justifies change in law. Legal, economic and political disincentives make permanent replacements an extremely limited option under present conditions. Finally, SHRM takes the position that the proposed legislation will increase strikes and will have very negative effects on all of the parties engaged in collective bargaining, not only on the picket line, but also at the bargaining table.

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